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# TREATISE

# ON DEEDS

## CHIEFLY AFFECTING MOVEABLES.

BY

ALEXANDER DUFF,

WRITER TO THE SIGNET,

AUTHOR OF A TREATISE ON THE DEEDS AND FORMS USED IN THE CONSTITUTION, TRANSMISSION AND EXTINCTION OF FEUDAL RIGHTS.

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TO

THE RIGHT HONOURABLE

ANDREW RUTHERFURD,

HER MAJESTY'S ADVOCATE FOR SCOTLAND,

MEMBER OF PARLIAMENT FOR LEITH, &c.

WHOSE DISTINGUISHED TALENTS

EMINENTLY QUALIFY HIM TO PROMOTE THE

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OF THE LAW,

THIS WORK,

HUMBLY INTENDED TO FACILITATE THE

CORRECT APPLICATION OF THE LAW IN PRACTICE,

IS MOST RESPECTFULLY INSCRIBED.

# PREFACE.

In the following Work I have employed the arrangement adopted in my Treatise on another branch of the subject, *Feudal Conveyancing*. The division is into *Chapters*, *Titles* and *Sections*; these last being occasionally subdivided into Articles. The numbers of the sections are carried on to the conclusion; and it is necessary to observe, that references to other parts of the work are by the *section*, or the *section* and *article*, not by the page. The number of the section with which a page concludes is repeated at the top of the following page, *below* the figures denoting the page. The figures in the *Index* refer to the *page*.

With respect to the *Attestation of Deeds*, I beg to refer to the introductory chapter of the *Feudal Conveyancing*, which it would have been inconvenient to repeat in this Treatise. But in those instances where special cases apply to particular deeds, I have noticed their application, under the head of the *Testing Clause*.

I thankfully acknowledge the indulgence with which my former work has been received,—a mark

of encouragement which has stimulated me to devote much time and attention to the present. In thus presenting to the notice of the Profession, commentaries on some of the more important deeds that relate chiefly to moveable property, I have endeavoured, as on the former occasion, to give the subject a practical shape, without wholly excluding all consideration of the principles of conveyancing.

EDINBURGH,
1*st June* 1840.

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| Balfour | *denotes* | Balfour's Practics, ..... | *cited by the Title and Chapter.* |
| Bankton | —— | Bankton's Institute, ..... | *Book, Title, Art.* |
| Bell, Com. | —— | Professor Bell's Commentaries, ..... | *Vol. and Page.* |
| Bell, Pr. | —— | ——————— Principles, ..... | *Paragraph.* |
| C. | —— | The Code of the Civil Law, ..... | *Lib. Tit. Cap.* |
| D. | —— | Digests or Pandects, ..... | *Sect.* |
| Craig | —— | Craig de Feudis, ..... | *Lib. Dieg. Sect.* |
| Dallas | —— | Dallas's Styles, ..... | *Page.* |
| Ersk. | —— | Erskine's Institute, ..... | *Book, Title and Section.* |
| F. | —— | Consuetudines Feudorum, ..... | *Lib. Tit.* |
| Ivory's Notes | —— | Notes by Lord Ivory on Erskine's Institute, ..... | *Number and Page; or Book, Title, Sect. and Number.* |
| Jurid. Styles | —— | Juridical Styles, ..... | *Vol. and Page.* |
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| Parker on Arbitration, ..... | | Notes by Mr Parker on the Law of Arbitration, ..... | *Page.* |
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| Bell's Cases | —— | Reports by the late Mr Robert Bell, ..... | *Page.* |
| F. C. | —— | Faculty Collection, ..... | *Date.* |
| S. | —— | Messrs Shaw and Dunlop's Reports, | *Date, vol. & page.* |
| S. (Ap.) | —— | Mr Shaw's Reports of Appeal Cases, | *Do.* |
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| Robertson | —— | Ditto by Robertson, ..... | *Do.* |
| Dow | —— | Reports of Cases in House of Lords by Dow, ..... | *Do.* |

## ERRATA.

Page 111, note (*g*) before *Trustees*, insert *Duncan's*

—— 162, line 3 from foot, after *General nature*, insert, *of the powers of trustees.*

—— 171, — 12 from top, for *as* read *or*

—— 187, — 2 from top, for *Art.* 1. read *Art.* 2.

—— 190, — 13 from top, for *general* read *universal*

—— 201, — 17 from top, after ACCEPTANCE BY WIFE, insert, IN LIEU OF LEGAL PROVISIONS.

—— 299, — 16 from top, for *sometime* read *sometimes*

—— 334, — 16 from top, after *Pleading*, insert *discussion, and notes of arbiters.*

# TREATISE

ON

# DEEDS

## CHIEFLY AFFECTING MOVEABLES.

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## CHAPTER I.

### DEEDS OF OBLIGATION.

#### TITLE I. HISTORY OF THE PERSONAL BOND.

1. Devices for taking interest (*a*).—The Canon law, or law of the Church, which at an early period materially controlled the Civil law, or law of the State, prohibited the lending of money for an annual payment, as contrary to natural justice. Whether the prohibition arose from a disinterested motive on the part of the churchmen, or a desire to monopolise the profits of money, it is unnecessary to inquire. The canon law having, in that age, from the extensive authority of the church, obtained universal respect in Christendom, usury was declared illegal by the Common law both of England and Scotland. But it is remarkable that the prohibition was confined to the loan of money upon personal security, whilst transactions of a lucrative description were permitted upon the security of land property. This state of the law threw the dealing in money, upon mere personal security, in a great measure

into the hands of the Jews, whose law does not prohibit the taking of interest from strangers; and their exactions becoming exorbitant, the evil, in course of time, suggested its own cure. Devices of various kinds were invented for eluding the prohibition, which were successfully practised under the refinements of the Civil law. It is alleged that certain Lombard and other Italian merchants were the first who attempted, in this island, to contend, under colour of the Roman law, with the Jewish money-lenders, who justified their usury, at least to their own consciences, by the law of Moses. These merchants are supposed to have brought with them the forms of deeds prepared in accordance with the imperial laws, by which the direct stipulation of a return for the loan of money was evaded in this manner. The civil law admits a distinction between express usury and damages and interest: it allows a lender to stipulate remuneration for the loss which he may sustain through delay in repayment of the sum advanced, although it condemns a return for the bare use of money. By the help of this legal fiction the Christian money-lenders were enabled to enter the market. Other equally fictitious modes of evasion were invented. The civil law permitting damages and interest to be taken, in certain cases, to double the amount of the sum advanced, the ingenuity of capitalists thence invented the English double bond, which has preserved in a great measure its original form, notwithstanding the change in the law. The taking of interest in England was legalised in the reign of Henry VIII.; but the creditor still stipulated for double payment, the restriction to the lawful interest on the loan being the operation of the law (*b*).

(*a*) The first three sections are taken, with slight alteration, from the author's work on Feudal Conveyancing, *v. Rights in Security.*

(*b*) See on this subject Ross, 1. 1. *et seq.*

2. RATE OF INTEREST FIXED.—In Scotland the intro-

duction of the civil law produced similar modes of evading the prohibition of the canon law; and we learn from Balfour that bonds, or, as they were then styled, obligations, were taken for double the sum advanced by the lender (*a*). Much evil arose from this state of things. Under the sanction of the civil law usurers were enabled to exact exorbitant returns from borrowers who had only personal security to offer. Those who were possessed of land property obtained loans of money at a more reasonable rate, by wadsetting their lands, or giving rights of annualrent over them secured by infeftment, which, as the lender had no power to call up his money, were not regarded as usurious. These annualrent rights were the more readily adopted, that securities over land obeyed a different rule in this country from that in force in England, and became feudal, to the no small aggrandisement of those who intrusted their money in this form of investment. Erskine informs us, "that the annualrenter infeft is not only "said to have died in the fee, but which is more material, "he enjoys the privileges of a baron" (*b*). The extortions of the money-lenders from those who were obliged to borrow on personal security, were, however, checked by degrees. The penalty introduced into obligations to cover loss and damage became subject to restriction by the court; and at length our Legislature, following the example of that of England, fixed the rate of interest at L.10, or five bolls of victual for every L.100, by the year (*c*). It would be erroneous, however, to assume that our Scottish statute was passed to authorise the taking of interest: the use of that term, which had been introduced from the civil law, proves that the purpose of the Legislature was not to legalise, but to restrict, and the act contains an exception of all lawful bonds, contracts, obligations, infeftments or other securities made antecedently upon annualrents of money or victual (*d*). Usury thus became the

taking, not simply of a direct return for the use of money, but of greater interest than the law permitted.

(*a*) Balfour, *v. Obligation*, c. 4.
(*b*) Ersk. 2. 8. 31.
(*c*) 1587, c. 52.
(*d*) See Ersk. 3. 3. 76; Ross, 1. 35.

3. ANNUALRENT RIGHT.—Under the altered state of the law with respect to interest, the annualrent right, by undergoing certain improvements and alterations, and borrowing from the wadset infeftment in the lands themselves, in place of in a yearly burden on their fruits, was transformed, on the one hand, into the modern moveable or personal bond, and on the other into the heritable bond. It would appear, from a method of relieving debtors in rights of annualrent, practised during the reigns of the last Stuarts, by allowing retention out of annualrents of one or a half *per cent.* when extraordinary supplies were directly imposed on the landed interest, in order to throw a share of the burden upon the capitalists, that the lending of money upon the security of land had at that period been carried to a great extent. But as such security must necessarily have a limit, a mode was devised, when money became more abundant, of investing it on personal security, without abandoning the feudal prejudice in favour of the annualrent right by infeftment (*a*). In the interval between the periods when President Balfour and Sir Thomas Hope wrote, the annualrent right had assumed the form which the advancement of the country in population and improvement, and the consequent necessity for a free commerce in money, would naturally produce (*b*). It had taken such a shape as to admit of the creditor calling up the principal sum on a requisition of forty days, and a term of payment and clause of execution were frequently inserted, which superseded the clause of requisi-

tion (*c*). In this situation, those lenders who were unable to procure heritable security, but desired that their investment should partake of the nature of heritage, introduced into their bonds an obligation to pay annualrent, *as well infeft as not infeft;* and we learn that the Court having dispensed with the substance, refused to exact adherence to the mere form, and at length adjudged a bond to be heritable, if it simply contained *an obligement to pay annualrent* (*d*). In this way, the extraordinary anomaly prevailed, of the mere payment of annualrent, and not the nature of the security, being the test of the quality of the right. The old annualrent right, improved in form, in one respect, by the wadset, and in another by the Roman obligation, was thus the parent both of the modern heritable and moveable bonds; the latter acquiring its present simple form after the Legislature had removed the anomaly which has been noticed, by declaring personal bonds to be moveable as to succession (*e*).

(*a*) Ross, 1. 44.
(*b*) Hope's M. P. (edit. 1726,) p. 35, § 99.
(*c*) Hope's M. P., p. 36, § 102.
(*d*) Stair, 2. 1. 3; See Ross, 1. 44-5.
(*e*) 1641, c. 57; ratified by 1661, c. 32, below, p. 9.

4. Passes into the personal bond.—The Reformation was the period from which the forms of heritable and moveable rights, thus flowing from the same source, began to assume a more perfect style. Ross affirms, indeed, that our personal bond, as well as the inland bill, were framed upon the model of the ticket, a writ which he conceives to have originated prior to the restriction of the rate of interest, as it bore a penalty "in case of failure" (*a*). But it would rather appear from the authorities to which he refers, and the decisions of the Court at the period alluded to by Sir T. Hope, that the modern personal bond

as suggested in § 3, was closely modelled upon the style of the annualrent right, by omitting the clause of infeftment and introducing certain minor alterations (*b*). Indeed, it is manifest from the history of the personal bond and its existing legal character, that it is just the annualrent right with a clause of repayment, but without the heritable security. The ticket appears to have unquestionably been the model on which our inland bill was formed, a supposition which seems by no means inconsistent with the remote origin assigned to it by Mr Ross, for even at that early period, a mercantile document of some kind must have been required in the ordinary transactions of society. The ticket appears by its form to have been rather an acknowledgment among mercantile persons and their customers for the price of goods than a writing granted in security of the loan of money, in which capacity it has been superseded by the inland bill and missive letter.

(*a*) Ross, 1. 45.

(*b*) See also Lord Kames's Report of Meuse, 22d Nov. 1748, M. 5507.

5. Bond acquired a mixed character. — It seems to be a conclusive proof that the personal bond was truly the annualrent right without the heritable security, that the Court, as above alluded to, (§ 3,) adjudged a personal bond to be heritable as to the succession either of the debtor or creditor, if it simply contained an obligation to pay annualrent. It came thus to be of importance to determine the effect produced upon the nature of the right by the occurrence of the term of payment of the annualrent, and the presumed intention of the creditor, which had been the original cause of the anomaly, continued to influence the decisions of the Court. (1.) The test of the character of the right as to heritable or moveable, being thus the introduction of a clause of annualrent, so as to give the security a tract of future time, and

make it in technical language a *feudum pecuniæ*, it followed necessarily that the omission of this clause, or even a suspension of the obligation to pay interest, rendered the bond moveable (*a*). (2.) Where again there was a clause of annualrent to have effect during the subsistence of the obligation, the bond was heritable after the term of payment of the principal, although falling due before any interest was exigible, for the reason, that the creditor, by not calling up his money when due, but leaving it upon an investment bearing interest, was presumed to mean that it should possess the character of a fee (*b*). (3.) And the converse held good, that a bond, prior to the term of payment of the principal, was in the ordinary case moveable. (4.) But as it was the presence or absence of an effectual clause of annualrent that determined the quality of the right, the latter rule was modified by the occurrence of a term of payment of interest, which made the right heritable (*c*); although not by a stipulation that interest should commence to run before the term of payment of the bond, if it did not also become payable prior to that period (*d*). (5.) It is affirmed by Erskine, that when the term of payment of the bond was distant or uncertain, the bond was accounted heritable prior to its arrival, because the distance or uncertainty of the day afforded evidence of the creditor's intention from the beginning to employ his money for a number of years together on interest. But the reports of the cases on which he relies do not bear this ratio, and in the earlier of the two it would have been plainly inapplicable, as the interest was stipulated to run only from the uncertain term of payment (*e*); and it may perhaps be doubted if these cases are now to be regarded in any stronger light than as indicative of undecided views on this branch of practice. (6.) Clauses of relief in bonds thus heritable from presumed intention are moveable, as not partaking of the nature of an

investment (*f*). (7.) The test of the character of the personal bond being thus the presence or absence of a clause of annualrent, and not the terms of the destination, it could have been of no moment that the contents were made payable to executors, who would thus have taken not as heirs *in mobilibus*, but heirs of provision (*g*).

(*a*) Ersk. 2. 2. 9; Porteous, 7th Dec. 1627, M. 5463.

(*b*) Ersk. as above; Smith, 29th June 1624, M. 5503; Brown, 21st Dec. 1626, M. 5503; Ross, 14th Nov. 1816, F. C.

(*c*) Stair, 2. 1. 4; Ersk. as in (*a*).

(*d*) Ersk. as in (*a*); Meuse, 22d Nov. 1748, M. 5506; Stewart, 9th July 1765, M. 5510.

(*e*) Ersk. as in (*a*); Falconer, 15th Jan. 1628, M. 5465; Gray, 13th July 1666, M. 3629.

(*f*) Stair, as in (*c*); Ersk. as in (*a*); Cant, 10th July 1628, M. 5564; Hart, 18th March 1630, M. 5566.

(*g*) See opinion of the Court in Ross, 4th July 1809, F. C. Much information on the history of the personal bond will be found in the report of this case.

6. Statute of 1661.—The state of the law described in the last section became highly inconvenient from the anomalous nature of the personal bond, which was thus subject to be altered in its character by the lapse of time. In 1641 (*a*), an act was accordingly passed, (ratified in 1661 (*b*)), whereby all contracts and obligations for sums of money containing clauses for payment of annualrent and profit are declared to be moveable, except in the following cases, viz. that they bear an express obligement to infeft, or are conceived in favour of heirs and assignees, excluding executors. The law was not, however, altered as respects the rights of husband and wife, or of the fisk, (the forfeiture of moveables to the Crown by single escheat); nor were any existing rights bearing the character of moveable made heritable by these statutes. Bonds, therefore, wherein the term of payment either of principal or interest has arrived, form no part of

the fund out of which, on the husband's death, the amount of the *jus relictæ* is estimated; and when the husband is the debtor in such bonds, their contents do not burden that fund as moveable claims. Nor, on the other hand, are bonds, which are payable to the wife, subject to the *jus mariti* of the husband (*c*).

(*a*) 1641, c. 57.

(*b*) 1661, c. 32. *Concerning heritable and moveable bonds.*—Our Sovereign Lord with advice and consent of His Estates of Parliament for many just and reasonable causes moving him *Statutes and Ordains* that all Contracts and Obligations for sums of money payable to parties at any time made and dated since the 16th day of *November* 1641 or to be made in time coming containing clauses for payment of Annualrent and Profit are and shall be holden and interpret to be Moveable Bonds except in these cases following viz. That they bear an express oblidgment to infeft or that they be conceived in favours of Heirs and Assignees secluding Executors In either of which cases Ordains the sums to be Heritable and to pertain to the Heir otherwayes to be confirmed by the Executor and to appertain to the nearest of Kin and to the Defunct's Executors and Legators according to the law and practick of Moveables Declaring always that all such Bonds *quoad fiscum* shall remain in the same condition as they were before the said 16th of *November* 1641, not to fall under the compass of single escheat, nor shall any part thereof pertain to the Relict *jure Relictæ* wher the bonds are made to the Husband, nor to the Husband *jure Mariti* wher the bonds are made to the Wife unless the Relict or Husband have otherwayes right and interest thereto Declaring nevertheless that this provision shall no wayes prejudge Wife nor Husband and their Executors of their respective titles and interests to the bygone annualrents of the said Bonds resting before either of their Deaths.

(*c*) Ersk. 2. 2. 10; Gordon, 31st July 1666, M. 5505; Ross, 14th Nov. 1816, F. C.; Meuse, 22d Nov. 1748, M. 5506; Dunlop *v.* Gray, 23d Feb. 1739, M. 5770.

7. EXCEPTIONS FROM THE STATUTE. — 1. *Bonds secluding executors.*—(1.) As excepted from the operation of the statute, bonds in which the succession of executors is expressly excluded continue heritable. Bonds thus conceived have been regarded as heritable of their own nature, and

not simply as giving heirs, by force of the destination, the sums expressed in them, as legacies. Consequently they are incapable of being carried by a general clause in a testament, even although executed by the creditor while domiciled in a country where rights of this nature are moveable (*a*). And this determination (with respect at least to bonds excluding executors which bear a clause of annualrent) seems strictly in accordance with the statute. For the purpose of the statute being to introduce the succession of executors, and thus to alter the old law, whilst its terms at the same time enable the creditor, at his pleasure, to supersede its operation by express words, it seems necessarily to follow, that bonds falling within the exception, thus, to all intents and purposes, retain the original character of bonds having a clause of annualrent, in so far at least as regards the succession of the creditor. With respect to the debtor, Lord Stair affirms that they are moveable, when his executor is not excluded (*b*); but there is nothing to prevent the debtor by express words from likewise burdening his heir to the exclusion of his executors. (2.) Bonds secluding executors being thus of their own nature heritable, it follows that their character cannot be altered by any act which does not restore the ordinary course of succession in moveables, and therefore a simple conveyance of such a bond would seem to carry it to the assignee as a heritable right. But the opinion of Erskine is against this inference when the conveyance is conceived in favour of the assignee *and his heirs*, unless his executors be excluded in express terms (*c*). (3.) When, however, the conveyance is to the assignee and his *heirs*, *executors and assignees*, the ordinary course of succession is thereby restored, by the clearly expressed will of the party having the absolute power of disposal (*d*). (4.) On the other hand, the creditor's heir taking a bond secluding executors, by service, plainly acquires the right

as it stood in the person of the deceased, and it continues heritable in his own person (*e*). (5.) Hence the practical rule is deducible, to repeat the exclusion of executors in express terms when it is intended that the bond shall continue heritable in the person of an assignee, in order to leave no room for question.

2. *Bonds containing an obligation to infeft.*—An obligement to infeft the creditor in, or an assignation to particular subjects in security, makes the bond heritable; not so an obligation to infeft in general, or to grant heritable security to the creditor (*f*).

3. *Bonds conceived in favour of heirs.*—It is affirmed by Erskine that bonds taken to heirs and executors, or simply to *heirs*, do not form an exception, but belong to executors as heirs *in mobilibus*, and that as a necessary result from the words of the statute (*g*). Even an express destination has no broader effect than to pass the right to an heir-substitute, if the appointment of the creditor continue unaltered: it is a proper moveable right, and, as such, transmissible by testament (*h*).

(*a*) See opinion of the Court in Ross, 4th July 1809, F. C. and auth. cit. The case, after a solemn decision of the whole Court, was compromised without a final judgment being pronounced.

(*b*) Stair, 3. 8. 47.

(*c*) Ersk. 2. 2. 12; but see note by Ivory, 27, and Ross, as in (*a*); Lockhart, 28th Jan. 1708, M. 5498; Kennedy, 18th Nov. 1747, M. 5499; Elch. *Herit. and Mov.* 13, notes 182; 5 B. S. 749.

(*d*) Ersk. as in (*c*); Sandilands, 17th June 1680, M. 5498.

(*e*) Ersk. as in (*c*); Mackay, 12th Jan. 1725, M. 3224.

(*f*) Ersk. 2. 2. 12; Watson, 5th Dec. 1794, M. 731; Hughson, 22d Nov. 1822, F. C. The clause was in these terms: "In consideration of "the convenience to me of the extension of the term of repayment of the "said principal sum to the year 1825, and for the greater security of the "said lender thereof and his foresaid, I farther bind and oblige myself, my "heirs and successors, to grant to the said Lawrence Hughson, his heirs, "executors and assignees, heritable security for the said principal sum, and "the aforesaid annualrent thereof, over any part of my estate to his or

"their satisfaction at any period he or they may desire it, and that under "the penalty of my or my foresaids being obliged to repay the said principal "sum within three months after demand, together with such rent or interest "thereof as may then be due upon it, on my or my foresaid's refusal to grant "the heritable security aforesaid, when so required."

(*g*) Ersk. 2. 2. 11; Laird of Lundie, M. 9428.

(*h*) Craik, 26th June 1739, M. 16,342, 5 B. S. 667; Duff, 11th Jan. 1745, M. 5429, 5 B. S. 741.

## TITLE II. PERSONAL BOND.

8. Clauses of the bond.—The personal bond consists of the following clauses, viz. 1. *The inductive clause.*—2. *Clause of obligation.* — 3. *Clause of registration.* — 4. *Testing clause.*

9. Inductive clause (*a*).—The form of the personal bond has been greatly simplified since the time of Dallas of St Martin's, who made the first collection of our styles of deeds; and even in his day, many of those clauses had been dropped out, which, according to Sir T. Hope, were borrowed from the annualrent right. This arose perhaps from the rejection by our law of the fictions, which a large portion of the clauses of the ancient obligation had been intended by its framers, the clerical notaries, to exclude. In this clause practice still retains the terms, *renouncing all exceptions to the contrary*, with reference to the receipt of the money, which are a condensed form of a more ample renunciation of exceptions. Mr Dallas's form bears a renunciation of the *exception of not numerate money, and all other exceptions and objections of the law whatsoever;* but the renunciation was originally of much greater length, and introduced by those notaries to exclude the pleas that were competent by the civil law (*b*). That of not numerate money was an exception competent to a party within a certain period after the date of the obligation, who had

granted an acknowledgment without receiving the specified sum by count, unless expressly discharged; but there is no evidence in our books that it came ever to be recognised in Scotland, with reference to obligations in which the receipt of the loan was expressed. At least it is now clear, that a party granting an acknowledgment for money, is presumed to have received the specified amount, until the contrary is established by his writ or oath (*c*); and the words, *renouncing all exceptions to the contrary*, which plainly cannot exclude such evidence, are therefore mere surplusage.

(*a*) I A. GRANT me instantly (*or* at the term of last, notwithstanding the date hereof, *as the case may be*,) to have borrowed from B. the sum of L. sterling, whereof I hereby acknowledge the receipt, renouncing all exceptions to the contrary.

(*b*) Ross, 1. 53.

(*c*) Gordon, 11th June 1833, F. C. and S.

10. OBLIGATORY CLAUSE (*a*).—1. *Obligation on representatives.*—(1.) By this clause the borrower binds himself, *his heirs, executors and successors*, to repay the sum advanced by the lender. Formerly, the word *intromitters* was added. Heirs and successors related to representatives in heritage, whether taking by law or by provision; and executors and intromitters to representatives in moveables. The reasons for anxiously introducing the debtor's representatives were of much force at an early period, when heirs, unless expressly obliged, could be proceeded against only *subsidiarie* for moveable, and executors were not liable for heritable debts. But, at the present day, when heritage and moveables are, in the ordinary case, equally subject to the diligence of creditors, although the heir and executor have their relief *inter se*, the mention of heirs and executors cannot be considered as essential to bind the debtor's representatives for sums contained in bonds, any more

than for the contents of bills or promissory-notes. An heir or executor is liable, as being in law the same person with the defunct; but when a debtor does not bind himself, he must expressly bind his successors to pay after his decease (*b*). (2.) Although not essential for the debtor to oblige his representatives *per expressum*, it may be convenient for the creditor that he shall not only thus bind his heirs, but also exclude the benefit of discussion, which heirs of certain kinds have at common law. This is done by an express clause (*c*).

2. *Terms of obligation of repayment.* — (1.) The debtor, in the old form of the clause, bound himself and his heirs, &c. to *refund, content, pay and deliver again*, words which are now sufficiently supplied by the single term, *repay*. The repayment is to be made to the creditor, *his heirs, executors and assignees*, terms which are customary, but not essential, because what belongs to one in property descends to his representatives or transmits to his assignees, although not expressed. (2.) Heirs and executors, or heirs simply, mean executors only, as heirs *in mobilibus*, (above, § 7, 3,) unless executors be expressly excluded, which is done by these words, *secluding executors not only from the benefit of the said principal sum, but also of any interest that may become due hereon.* (3.) It follows from the free transmissibility of obligations, that a bond is assignable, although not taken to assignees; and even an express exclusion of assignees is ineffectual to prevent the conveyance of a bond for onerous considerations, although gratuitous transmission is thus rendered incompetent (*d*).

3. *Term of payment.* — (1.) The principal sum is ordinarily made payable at the first term of Whitsunday or Martinmas next after the date of the bond; but any other term is at the option of the parties. In a common transaction by loan, it is seldom that any variation from

the usual style can occur in the term of payment; nevertheless, in peculiar circumstances, such may be agreed on, or become necessary. Thus, a debt may be made payable *betwixt and a certain day*, or within a specified number of days, weeks or months; or payment may be stipulated by instalments payable at equal periods, usually of six months. (2.) In all such cases, it is a general rule, that the time allowed to the debtor is the longest that the words admit of—a rule founded on the presumption, that the creditor has, in the general case, the control over the terms of the obligation, which are therefore interpreted unfavourably for him. The debtor has thus the whole of the term day, so that diligence for implement cannot proceed until the day has fully expired, although diligence merely in security is competent before the obligation has become exigible, when the debtor is bankrupt, or *vergens ad inopiam.* Even under an obligation to pay betwixt *and a certain day*, this day is held, by what may appear rather a stretch of the above rule of construction, to be inclusive (*e*). And the day of the date, in a period of so many days, *e. g.* twenty days, is uniformly exclusive—in other words, the days are free days. In a period of weeks the like holds good, the day of the last week of the period, corresponding to the day of the date, being inclusive; and this applies also to months; but as these, unless it is otherwise expressed, are, on the same principle, construed to be calendar, not lunar months, the period does not run into a new month. (3.) An obligation prestable by instalments is generally qualified by a condition, that if one or more instalments (as may be agreed on) shall run into a second or third, &c., the full debt shall be immediately exigible, — a stipulation, which, as being not strictly penal, is interpreted according to the terms employed. (4.) A bond may be taken payable on the condition of the occurrence of an uncertain

event, thence called a *contingent* obligation; or when a certain event shall have happened, *e. g.* the death of the debtor himself (*f*), to which the term *future* applies. In such cases, it is of importance for the conveyancer to bear in mind, that diligence prior to the term of payment is incompetent, unless in security, and that only on bankruptcy, or the debtor being *vergens ad inopiam* (*g*).

4. *Interest.*—(1.) The term of payment of the principal being ordinarily the term of Whitsunday or Martinmas next following the date of the bond, interest is made payable at the same term for the period preceding, commencing at the date of the advance, whether identical with or prior to the date of the bond; and so forth, half-yearly and termly, during the subsistence of the loan. (2.) It is not the practice to introduce a penalty applicable to the interest in moveable, although this is uniformly done in heritable bonds; but the reason for the distinction is not apparent. A charge becomes necessary for the interest due on a moveable bond, more often than for the interest of a loan heritably secured, whence much inconvenience might be caused by the omission of a termly penalty, as it is questionable if the expense thus incurred would be considered a liquid claim under the general penalty, which, in terms, is specially applicable to the principal sum. (3.) The words *yearly, termly and continually*, criticised by an ingenious writer, appear to be less liable to the objection of redundancy than many parts of our styles (*h*). The two latter import that the interest is due *de die in diem*, and payable termly, and the first, that it is to be calculated at the legal (or other stipulated) rate *per annum*. The word *daily* is recommended as more explicit than *continually*. (4.) Interest may be restricted either in the bond, or by a separate letter; and the clause quoted in the notes may in this case be adopted (*i*).

5. *Penalty.*—(1.) The penalty in bonds is uniformly

stated at a fifth part of the principal sum, the proportion fixed by the statute abolishing apprisings, as the amount which a creditor leading a special adjudication shall receive on account of his taking land for his money (*k*). But the penalty, although thus limited by an amount which it cannot exceed, is seldom exigible in full. When personal diligence is put in force, the penalty is held to be liquidated, to the effect of validating a charge upon the decree of registration, only to the extent of the *necessary expenses*, for to these the penalty is uniformly restricted; and in this respect it differs from a penal or additional rent in leases, which is exigible in full on a breach of the contract (*l*). (2.) Necessary and reasonable charges, or, as Stair describes them, the real expenses and damages of parties (*m*), comprehend the expense of diligence, or other proceedings necessary in defending the right, or proper for recovering or rendering a debt effectual according to the form of the security; and they have been held not to include the costs of recovering the contents of a collateral security. In a multiplepoinding or ranking they are added to the principal claim (*n*). The rule, that expenses of process incurred in discussing points connected with the security, or even defending the right, do not fall within the terms of the obligation, since expenses, when justly incurred, are usually awarded against the opposing party, seems to be limited to questions between the creditor and debtor themselves. In a case relating to a heritable security, the penalty was held to cover law expenses necessarily incurred in maintaining the preference of the security against another creditor, and that although the Court had not found expenses due in the litigation between these parties (*o*); but such questions are in a great degree circumstantial. Extrajudicial expenses, when necessarily incurred, are favourably regarded (*p*). (3.) Even after the creditor has led an adjudication on his bond, it is not

clear that the equitable interference of the Court in restricting the penalty is excluded. A creditor-adjudger, as above mentioned, is allowed a fifth part of the debt over and above its amount, on account of his taking land for his money; and although the enactment applies to *special* adjudications only, the Court have permitted the creditor to rank under the *general* adjudication for the penalty, if it do not exceed a fifth of the debt, as the only mode known in practice of rendering an adjudication special; but a different rule is said to have been recognised in a later case, although this does not clearly appear from the report (*q*). (4.) A penalty which exceeds a fifth of the principal sum is exorbitant, and exorbitant penalties may be restricted even after adjudication (*r*). (5.) The penalty in bonds and contracts adjected to sums of money is thus regarded as a means of enforcing payment and indemnifying the party for expenses necessarily occasioned, and does not come in place of the obligation itself, even where the words, *over and above performance*, are omitted (*s*).

(*a*) WHICH SUM of L. sterling I BIND and OBLIGE myself, my heirs, executors and successors, to REPAY to the said B., and to his heirs, executors or assignees, at the term of next, with the sum of L. *(a fifth of the principal,)* of liquidate penalty in case of failure, and the legal interest of the said principal sum from the date of these presents, (*or* from the said term of last,) to the foresaid term of payment, and thereafter during the not payment thereof; and that at two terms in the year, Martinmas and Whitsunday, beginning the first payment of the said interest at the said term of next, for the proportion thereof which shall be due at that term, and the next payment of the same at the term of 184 , for the half-year immediately preceding, and so forth by equal portions at the said two terms yearly, termly, daily and continually thereafter, so long as the said principal sum shall remain unpaid, *(the following words are not usual, but are recommended,)* with a fifth part more of each of the said termly payments of liquidate penalty in case of failure in the punctual payment thereof at each and all of the terms above specified.

(*b*) See Hamilton, 21st Jan. 1708, M. 5909, 9436.

(c) Ersk. 3. 8. 52. The clause may be thus expressed: I bind and oblige myself and my heirs, as well of line as my heirs-male, of tailzie, conquest and provision, and all others my heirs, executors, successors and intromitters with my goods and gear whomsoever, conjunctly and severally, renouncing the benefit of discussing them in their order and priority to pay, &c.

(d) Ersk. 3. 5. 2; Boswell, 7th Feb. 1759, M. 12,578.

(e) Fac. of Advocates, 26th Jan. 1675, M. 345; Cockburn, 31st Jan. 1724, M. 640, 2269.

(f) See Hamilton, as in (b).

(g) See as to obligations, pure, conditional and *sub modo*, Ersk. 3. 1. 6, *et seq.*; Bell, Pr. 45, *et seq.*

(h) Ross, 1. 63.

(i) But it is hereby declared, that in case the said interest be not paid within twenty days after each term as above specified, then, and as often as I shall fail to pay the same at the rate above mentioned within the said space after the term of payment, interest at the legal rate shall be payable by and exigible from me and my foresaids, and I consent that diligence shall pass against us accordingly.

(k) 1672, c. 19.

(l) Ersk. 3. 3. 86, and Notes by Ivory; Hunter's Landlord and Tenant, 775.

(m) Stair, 4. 3. 2.

(n) Gordon, 27th Nov. 1761, M. 10,050; Cred. of Jarvieston, 24th June 1782, M. 14,132; Mein, 26th May 1829, F. C., 7 S. 653; Jameson, 4th June 1835, 13 S. 865.

(o) Bell, Com. 1. 657; Allan, 23d Dec. 1737, M. 10,047; Smith, 3d June 1800, M. App. *Expenses*, No. 2; Ramsay, 22d June 1826, 4 S. 737; Mein, as in (n); see Allardes, 19th June 1788, M. 10,052.

(p) Hynd, 30th May 1826, 4 S. 628.

(q) Macadam, 25th July 1787, M. 10,051; see Bell, Com. 1. 657, and note 11 on Buchanan, 20th Jan. 1801, M. App. *v. Adjudication*, No. 12.

(r) Stair, 3. 2. 32; Porteous, 23d Nov. 1783, M. 120.

(s) Beattie, 26th Dec. 1695, M. 10,039; Broomfield, 11th Aug. 1753, M. 9446.

11. VARIATIONS ON THE OBLIGATORY WORDS.—1. *From the status of the granter or grantee.*—The terms of the clause of obligation are subject to numerous variations, arising chiefly from the status of the granter or grantee, the person benefited or burdened, the limitation of the obligation, and the like. (1.) Thus a bond by a trustee or factor

bears an acknowledgment by him in that character, for the loan, and an obligation on the granter, *qua* trustee or factor, and on his constituent personally, for its repayment. Where there are more than one trustee, it is material to observe that the quorum, (including a *sine quo non*, when such has been named,) appointed by the trust-deed, or in the absence of such appointment, the whole accepting or surviving trustees, will join in the deed (*a*). (2.) Tutors bind the pupil only, and the whole of their number must execute the deed, unless they be testamentary tutors, in which case their powers are regulated by the deeds under which they act, as are those of trustees (*b*). Curators again do not bind minors, but merely concur as consenters, and are subject to the rules which define the number competent to act as tutors. (3.) A bond by the council of a burgh is executed by the whole members, or at least the legal quorum of such council, and binds the members and their successors in office, (not personally,) but as representing the community; and a bond by any other incorporated body is granted in the form expressed in the charter or statute of incorporation, or established by law. (4.) In regard to the terms of an obligation by or in favour of an unincorporated company, see *Bond of Credit*. (5.) A bond by a married woman is granted and subscribed by the husband, as specially advising and consenting to the obligation (*c*).

2. *From the number of the obligants.*—The obligatory clause of bonds granted by more than one obligant is subject to technical rules of much strictness. Co-obligants may be bound simply, or with the addition of the words *conjunctly and severally*. Questions have likewise occurred on the use of one of these terms, *conjunctly* or *severally*; so that the true meaning of these words of obligation is of much importance. (1.) Our rules on this head have been derived from the civil law. Stair observes, that

" debtors use to be bound conjunctly and severally, but " when that is omitted the debtors are understood but " bound conjunctly or *pro rata*; for *in dubiis potior est con-* " *ditio debitoris*: if the debtors were bound by several obli- " gations, not relating to others as becoming parts of the " same obligation, all are bound severally, and *in solidum*; " but when they are bound together in one bond, and so " *correi debendi*, by the ancient Roman law they were all " liable *in solidum*, which was altered by Justinian's Novel " Constitution (*d*), giving the benefit of division *pro rata*," &c. (*e*). From this passage it is plain that the term *conjunctly* was understood in Stair's time to have no distinctive meaning when used separately, an obligation by two or more parties being in its own nature joint; but that the addition of the word severally was necessary to make it a legal phrase; and that *severally* used alone, (as is indeed manifest from the obvious signification of the word,) imported an obligation *in solidum*. A view substantially alike is taken by Erskine (*f*); and the authority of Ross is to the same purport (*g*). The words, conjunctly and severally, seem indeed to be a translation of the Latin phrase *conjunctim et divisim*, which was employed in the Roman practice to exclude the *beneficium divisionis*, and used together for expressing both the joint nature of the obligation, and the separate right conferred on the creditor to enforce it against any one of the co-obligants. Accordingly, the effect of the terms *conjunctly and severally*, or *severally*, from its plain meaning, to bind co-obligants *in solidum*, has never been doubted. But Mr Bell affirms that the word *conjunctly* in like manner imports an obligation *in solidum* (*h*),—a view which, if well founded, necessarily implies that it is indifferent to the conveyancer, whether he employ any of the terms, *conjunctly*, *conjunctly and severally*, or *severally*, to express the same meaning. But the author would with deference venture to question the soundness of the opinion thus in-

dicated; for the cases relied on by that learned author relate, the one to a mere letter of guarantee, on the faith of which a sale of cattle took place, and which was interpreted according to the vulgar (not the legal) acceptation of the word conjunctly, as applicable to such a transaction; and the other to a bill, which is a privileged document (*i*). There is moreover an express decision to the contrary in relation to a formal bond, and numerous instances occur in which it has been assumed that the word conjunctly imports a rateable obligation only (*k*). In a later case, also, it was held that two co-obligants binding each *along with* the other, terms in substance equivalent to the word *conjunctly*, were liable only *pro rata* (*l*). (2.) The terms *full debtor* have been held to bind *in solidum* (*m*); but *co-principal* seems to be of importance only as applied to a cautioner; (below, § 12.) (3.) The nature of the transaction out of which the debt arises, *e. g.* that it is a joint adventure, will subject co-obligants in a joint and several obligation; and a similar liability is incurred when the subject of the obligation is indivisible, although it should be estimable in money, unless it resolve into payment of a specified sum as an alternative prestation (*n*). (4.) Explanatory terms in other clauses of the deed have been admitted to supply the omission of the words conjunctly and severally; but such cases indicate a laxity of practice, and are to be carefully shunned as precedents (*o*). On the other hand, the addition of qualifying words may destroy the effect of the technical phrase (*p*). (5.) An obligation *in solidum* imports a right in the creditor to demand the whole debt from any one or more of the co-obligants, and that *pro rata*, a claim on each only for his equal share, without regard to the solvency or bankruptcy of the other obligants.

3. *Description of the creditor.*—(1.) The creditor or payee is, like the debtor in the bond, described by name

and surname, and likewise by profession, residence or other sufficient mark of individuality, in regard to which no precise rules can be laid down. Bonds to an incorporated body are taken payable to the corporate firm, and it is usual to add the treasurer and his successors in office; but if another form be prescribed by the charter or statute of incorporation, such will of course be followed. (See also *Bond of Credit.*) (2.) If the contents are intended for the heir in place of the executors of the creditor, the right of the latter must be superseded by an exclusion of executors, (above, § 7,) both as to principal and interest. (3.) Where the purpose is to benefit a series of creditors in their order, (an unusual form of obligation,) this may in words be effected by a substitution, which is expressed by means of the terms *whom failing* between each member of the destination. It is not unusual to insert a declaration that the institute (or immediate creditor) shall have power to discharge or assign at pleasure; but this is superfluous as regards a discharge. Bonds so conceived are heritable only by destination, and substitutions even in proper feudal rights are defeasible by the party in the immediate right, by deed, unless granted on deathbed. (4.) Bonds conceived in favour of more than one creditor jointly express the parties, *their heirs, executors and successors*, or the parties, *in liferent, and their heirs, executors and successors, in fee;* and if it is intended that the contents shall belong to the survivor, they are taken to the parties *in liferent, and the longest liver, and the heirs, executors and successors of the longest liver, in fee.* (5.) Bonds to married persons follow certain peculiar technical rules in reference both to the destination and the exclusion of the *jus mariti* and right of administration; for which see *Marriage-Contract.* For examples of these and other variations, reference is made to the Juridical Styles (*q*).

(*a*) See Duff, Feud. Convey. § 324.

(b) See Ersk. 1. 7. 15. It is recommended, where a quorum is not named, to obtain the concurrence of all the accepting tutors, and not merely of a majority.

(c) For these and other minor variations, see Jur. Styles, 2. 26, *et seq.*

(d) Nov. 99, c. 1.

(e) Stair, 1. 17. 12. 20.

(f) Ersk. 3. 3. 74.

(g) Ross, 1. 77.

(h) Bell, Com. 1. 345.

(i) Sloan, 5th Feb. 1751, M. 14,630; M'Kellar, 7th June 1811, F. C.

(k) Campbell, 25th Nov. 1724, M. 14,626. See Scotts, 2d June 1593, M. 14,638; Sinclair, 13th Feb. 1624, M. 14,638; Munro, 20th July 1705, 4 B. S. 617.

(l) Alexander, 28th Nov. 1827, F. C., S. 6. 150.

(m) Cleghorns, 26th Dec. 1707, M. 14,624. It is however to be observed, that according to Fountainhall's report, the co-obligants were held to be in a society.

(n) Ersk. 3. 3. 74; Bell, Com. 1. 346; Grott, 14th June 1672, M. 14,631, 1 B. S. 640; Lord Urie, 20th Jan. 1630, M. 14,626.

(o) Boyd, 3d July 1649, 1 B. S. 403; Wallace, 7th July 1671, 1 B. S. 635.

(p) Farquhar, 28th July 1638, M. 2282. The words *conjunctly and severally, ilk one for his own part,* were here held to import an obligation *pro rata* only.

(q) Jur. Styles, 2. 26. *et seq.*

12. VARIATIONS ON THE OBLIGATORY CLAUSE BY THE INTRODUCTION OF CAUTIONERS.—1. *General nature of cautionary.*—(1.) A party binding for another, as cautioner, interposes his own credit to maintain that of his friend, without directly benefiting by the money advanced by the lender. From the nature of the obligation, he is ultimately liable in the full amount of the debt, at least of the loss, in a question with the creditor (a); whereas co-obligants, bound simply as such, (and not *in solidum,*) are presumed to have received each an equal share of the advance, and to be liable in repayment accordingly. The obligation of cautionary, as constituted by formal deed only, is the proper subject of consideration in a work of this nature. The terms of constitution are various. A

cautioner may be bound in that express character in the same or a separate deed, or, when bound in the same deed with the principal debtor, he may join as a co-principal, or a full debtor, or conjunctly and severally, of which several terms, joined to an obligation as cautioner, the effect is explained below; for all co-obligants are liable in repayment according to the constitution of the obligation, although the money advanced has been received and used by only one of their number. But if a party, who is truly a cautioner, engages as a principal debtor, and not also *qua* cautioner, he is liable only as a principal debtor, according to the rules above explained, (§ 11.) A cautioner, on the other hand, as already stated, who is bound as such, is ultimately liable in the whole loss, whatever the terms of the bond. (2.) There are other methods of a less formal nature than by bond, in which the obligation of cautionary or suretyship may be constituted, although these do not fall within the province of the conveyancer. Letters of guarantee, credit and recommendation *in re mercatoria* are of constant occurrence, and are construed according to the nature of the transaction and the fair meaning of the terms.

2. *Terms exclusive of the rights of discussion and division.*—(1.) The question of *division* may arise where there are two or more co-obligants bound in the same deed. The right of *discussion*, or that privilege which a cautioner, bound simply as such, has to withhold payment until the creditor in the first instance proceeds against, or, in technical phrase, *discusses* the debtor, (unless notoriously bankrupt,) by means of diligence, also highly concerns the creditor. In regard to the right of relief among cautioners and other co-obligants, see *Bond of Relief.* (2.) Cautioners whose character appears from the deed, but who became bound simply as cautioners or sureties for (not with) the debtor, have the benefit

of discussion. But they are ultimately liable *in solidum*, although *subsidiarie* only, as having good ground for a stay of diligence until the debtor has been discussed; so that the privilege thus imports delay merely, and not a defence on the merits. (3.) Those, again, whose character is expressed, but who undertake a joint liability, are bound *pro rata*, even in the first instance; and as the creditor must be safe, the solvent cautioners make up the loss arising from the insolvency of any of their number. This form of undertaking is constituted by any term effectual among co-obligants to bind merely *pro rata*, such as *conjunctly* or *co-principal*, used in connection with the word *cautioner* or *surety*, or other sufficient indication of character (*b*); and thus the benefit of discussion is excluded, because the obligant is not only a cautioner, but bound as a co-obligant. (4.) On the other hand, when the cautioners become bound in such terms as are sufficient to constitute an obligation among co-obligants *in solidum*, although joined with words importing cautionary, they are held to renounce the benefits both of discussion and division. The terms, conjunctly or severally, (or even *severally*, or *full debtor*,) imply therefore an exclusion of these rights (*c*), (above, § 11); and a cautioner bound as full debtor, conjunctly and severally, has been held liable, although the principal was free in consequence of an informality in the mode of executing the bond (*d*). (5.) The cautioner of a debtor whose continued absence prevents his being discussed in this country is excluded from the ordinary privilege (*e*); and it may perhaps be doubted whether it be competent to cautioners in the indentures of minor apprentices, a class who are not usually possessed of any means (*f*). (6.) It follows, from the rules above stated, that the proper technical words for excluding the rights both of discussion and division, are *cautioner*, *surety and full debtor*, *conjunctly and severally*, *with and for* the debtor,

or (when it is of importance, as in reference to the septennial limitation, to exclude all trace of cautionary,) the obligants may be bound as co-principals, according to the rules explained in § 11. 2.

3. *Obligation of the cautioner separate.*—In a large class of cases, the obligation of the cautioner is separate from that of the debtor. To this belong bonds in judicial proceedings, *e. g.* suspensions, advocations, confirmations, loosing of arrestments, &c. (1.) Bonds of caution, as they are called, in these and the like cases, are expressed in a nearly uniform style (*g*), and impose an obligation which seems equivalent to an undertaking *ad factum præstandum*, and has been held to exclude the benefit of discussion (*h*); and even an attestor in a judicial bond, who is, by the terms of his obligation, liable only *subsidiarie*, cannot insist farther than that the principal cautioner shall be denounced (*i*). (2.) Cautioners for the proper discharge of an office, such as that of messenger, are likewise bound separately, in bonds of which the form is prescribed by statute, or of an official style, and which do not fall within the ordinary practice of the conveyancer (*k*).

(*a*) Bell, Com. 1. 347.

(*b*) Ersk. 3. 3. 63; Grant, 6th July 1721, M. 14,633. Here a clause of relief in the bond was held to prove the character of the cautioner. In Burnet, 29th June 1742, M. 11,018, it was held that the word *with* (not *for and with*) is insufficient.

(*c*) Dunbar, July 1665, M. 3584; Ld. Cloberhill, 26th Jan. 1631, M. 14,623; Sibbald, 21st June 1758, M. 588; Forbes, 2d July 1708, 4 B. S. 708.

(*d*) Johnston, 8th July 1680, M. 2076.

(*e*) Elams, 7th Dec. 1757, M. 2110.

(*f*) See Forbes, as in (*c*).

(*g*) Jurid. Styles, 2. 76. *et seq.*

(*h*) Ersk. 3. 3. 72; Strachan, 17th June 1714, M. 3583; Dickie, Dec. 1743, M. 2110.

(*i*) Henderson, 12th June 1824, S. 3. 133. In regard to Judicial Cau-

tion, see Bell, Com. 1. 380, *et seq.*; Ersk. as in (*h*); A. S. 29th Jan. 1650; A. S. 27th Dec. 1709; Dickie, as in (*h*).

(*k*) See Ersk. as in (*h*); Jur. Styles, as in (*g*); Bell, Com. 1. 362, *et seq.*

13. VARIATIONS ON THE OBLIGATORY CLAUSE WITH REFERENCE TO THE SEPTENNIAL LIMITATION.—1. *Terms of the statute* (*a*). (1.) The nature of the septennial limitation of cautionary obligations is of much importance to the conveyancer, because its application depends almost wholly on the terms of the bond. The statute on which it rests was passed with the intention of limiting the endurance of engagements undertaken for friends, whose honour and pecuniary sufficiency are never doubted, often without that deliberation which one exercises in matters that more immediately relate to his own affairs. But the mode in which the act is expressed has made it a matter of no difficulty to evade its intendment, the principle of interpretation being at the same time rigorous, as it is correctory of the common law. Still it must be borne in mind, that after a lapse of time has given experience of the practical working of an enactment, it is easy to affirm that its provisions are ill expressed, and that, in matters relating to the rights of creditors, it is highly difficult to frame provisions of such stringency as to be incapable of evasion. (2.) The statute consists of two branches: the former, which is statutory, provides, that "no man binding and "engaging for and with another, conjunctly and severally," shall be bound for longer than seven years after the date of the bond; the latter, which is explanatory, declares, that not only an express cautioner, but a party, although appearing on the face of the obligation to be a principal or co-principal, shall have the benefit of the act if he have either a clause of relief in the bond, or a bond of relief apart, intimated personally to the creditor at the time when the obligation is delivered to him.

2. *Construction of the statute.*—(1.) The principle of interpretation, as before observed, is strict. (2.) A party pleading the statute must be bound at the same time with the principal debtor, for its terms bear both that the obligation shall be joint, and that the prescription shall begin to run from *the date of the deed;* and thus a bond of corroboration, or other obligation granted *ex post facto*, falls not within its scope (*b*). But as the term contract implies two sides, which need not be contained in the same deed, provided the separate deeds are executed *unico contextu* and bear reference the one to the other, it has been assumed that a cautionary obligation, granted of the date of, and with reference to, the principal deed, and thus forming part and parcel of the arrangement, falls within the provision of the statute (*c*); but if the separate documents, although bearing the same date, have no reference to one another, the operation of the statute is excluded (*d*). (3.) If an obligant appear on the face of the bond to be a cautioner, the requirement of the statute, that he shall have a clause of relief in the deed, or a separate obligation of relief intimated to the creditor, does not apply, even although he should also be bound as full debtor, because the purpose of the Legislature in this provision was solely that the creditor might be apprised of the character of the party (*e*). But when the cautioner, although truly appearing, from circumstances extraneous to the deed, to bear that character, is bound simply as co-principal, he cannot claim the benefit of the statute without having an intimated obligation of relief (*f*); and the same rule applies even where a party who is a real cautioner is made an apparent co-principal by this form of obligation: "I, the said A., "and with (not for and with) me, B., bind and oblige us, "conjunctly and severally," &c. (*g*). It must be admitted that this is according to a most rigorous construction of the statute, the acknowledgment of the receipt of the

money by A. being a clear indication of the fidejussorial character of B. (4.) The cautioner, whether described as such, or as an ordinary co-obligant, must, by the terms of the statute, be bound *conjunctly and severally* with the principal debtor, which means that there shall be a substantive and immediate obligation on him *in solidum*, capable of being enforced without reference to the principal (*h*). (5.) The separate bond of relief which a co-obligant not bound as a cautioner is required to possess, must be intimated to the creditor at the time when he receives the principal document of debt (*i*); and this intimation ought to be notarial, private knowledge on the part of the creditor being insufficient to found the statutory plea (*k*); but it has been sustained as equivalent to formal intimation, that the creditor was the writer of and a witness to the execution of the bond of relief (*l*); and it is thus probable that the same rules would be held to apply in regard to the intimation of a bond of relief as to that of an assignation (*m*). See *Assignation*. (6.) The result to the conveyancer seems thus to be, that in order to exclude the operation of the statute, the cautioner, if a party to the bond, must engage as co-principal, conjunctly and severally with the debtor, without the term cautioner or surety, or other words, such as *for, on behalf of*, or the like, sufficient to evidence that character, and without a clause of relief intimated to the creditor when he receives delivery of the bond; or if the cautioner be bound by a separate writing, that such writing shall bear a later date than the bond, or if of the same date, that the bond and writing shall have no reference the one to the other.

3. *Exceptions.* — Those deeds that are usually classed as exceptions from the operation of the statute are chiefly of a kind which do not with propriety fall under that description, as being in a form to which the statute

would be inapplicable, whatever their nature. (1.) Bonds of corroboration, as above stated, are excluded from the operation of the septennial limitation, as granted of a later date than the principal obligation, a rule which applies to a bond of relief by one cautioner to another; (above, Art. 2); and a mercantile guarantee is excepted as varying in date (*n*), and indeed wanting in all respects the requisites of the act. (2.) Obligations *ad facta præstanda* do not fall within the terms of the statute, which mentions bonds and contracts for sums of money (*o*); and in the same class have been ranked bonds of caution for the faithful discharge of an office (*p*). (3.) It has been ruled that the statute does not extend to a cautioner in a suspension, on the ground that the cause may not be finally decided within the seven years (*q*); but this sort of obligation is likewise excluded, as granted *ex post facto*, a reason which seems to apply to all judicial bonds (*r*). (4.) Those bonds and contracts are excluded in which the term of payment expressed in the obligation is beyond seven years from its date, so that diligence cannot proceed within the statutory period (*s*); or which cannot be enforced within that period (*t*),—a ratio that applies to a cautionary obligation for the payment of an annuity or jointure, or the interest upon a loan, each term's payment being a distinct and separate debt (*u*); and also it is thought to bonds of credit, bonds by factors, &c. with cautioners, for the faithful performance of their offices, and engaging to hold count and reckoning, the obligations of cautioners in indentures, and the like; for in all these cases the undertaking is prospective. (5.) Cautioners for the payment of a composition have not the benefit of the limitation, because they engage to pay when the debts shall be ascertained, which is an uncertain term (*v*), a rule that seems to extend to all cases where the liquidation of the claims for which the surety has engaged is uncertain in

point of time. (6.) An obligation of rateable relief amongst co-obligants, which is no more than what the law enforces without express paction, does not bring the bond or contract in which it is contained within the operation of the statute: it applies solely to clauses whereby one or more co-obligants have full relief against another as principal debtor, or at least relief for some part of the amount that would fall to their share if the division were equal (*w*). (7.) Cautioners in marriage-contracts have not the benefit of the limitation when the principal obligation is uncertain as to the term of payment, or applicable to a tract of time, as for jointure (*x*). But the *dictum* (*y*), that the obligation of a cautioner in a marriage-contract is an invariable exception, must be received with caution; for it is quite possible that an engagement in such a deed may be consistent with the requisites of the statute, *e. g.* an undertaking by a relation of the husband or wife, and a cautioner, to pay a sum to trustees at a specified term, such as a year, or other limited period after the date of the marriage.

(*a*) 1695, c. 5. *Act anent principals and cautioners.* His Majesty and the Estates of Parliament considering the great hurt and prejudice, that hath befallen many persons and families and ofttimes to their utter ruine and undoing, by men's facility to engage as Cautioners for others, who afterwards failing, have left a growing burden on their Cautioners without Relief. Therefore, and for Remead thereof, His Majesty, with advice foresaid Statutes and Ordains, that no man binding and engaging for hereafter, for and with another conjunctly and severally, in any Bond or Contract for sums of money, shall be bound for the said sums for longer than seven years after the date of the Bond, but that from and after the said seven years, the said Cautioner shall be *eo ipso* free of his caution. And that whoever is bound for another either as express Cautioner, or as Principal or Co-principal, shall be understood to be a Cautioner, to have the benefite of this Act Providing that he have either clause of Relief in the Bond, or a Bond of Relief apart, intimat personally to the creditor at his receiving of the Bond, without prejudice always to the true Principals, being bound in the whole contents of the Bond or Contract; As also of the the said Cautioners being still bound, conform to the terms of the Bond

within the said seven years, as before the making of this Act; As also providing, that what Legal Diligence, by Inhibition, Horning, Arrestment, Adjudication, or any other way, shall be done within the seven years, by Creditors against their Cautioners, for what fell due in that time, shall stand good, and have its course and effect, after the expiring of the seven years, as if this Act had not been made.

(*b*) More, 16th Feb. 1710, M. 11,011; Scott, 8th Feb. 1715, M. 11,012; Gordon, 16th Nov. 1748, M. 11,025. See an ingenious exposition of the statute by Lord Kames in Caves, 4th Dec. 1742, M. 11,021; Bruce, 26th June 1793, M. 11,033. This case related to a bond of relief by one cautioner to another.

(*c*) Tait's Trs. 8th Dec. 1836, F. C., D. 15. 221. See Drysdale, as in (*k*).

(*d*) Howison, 7th Dec. 1784, M. 11,030.

(*e*) Ross, 11th Dec. 1729, M. 11,014; Douglas, Heron and Co. 20th Nov. 1792, M. 11,032, affd. 1800; Scott *v.* Yuille, 27th Nov. 1827, F. C., S. 6. 137, affd. 15th Sept. 1831, W. S. 5. *The clause was in these terms:* We, A. and B. as principals, grant us hereby, at the date hereof, to have borrowed and received from C. and D. junior, the sum of L.
sterling money of principal; and therefore we as principals, and with and for us, E. and F., as cautioners, sureties and full debtors, bind and oblige us, jointly and severally, and our respective heirs, executors and successors whomsoever, to make payment to the said C. and D., and to the survivor of them, and their or his assigns, of the foresaid sum of L.
sterling of principal, and that at and against the term of Whitsunday next, &c.

(*f*) Blackwood, 9th June 1752, M. 3396; Smith, 22d Nov. 1821, S. 1. 159; affd. W. S. 1. 315.

(*g*) Burnett, 29th June 1742, M. 11,018.

(*h*) The statute as in (*a*). See the argument in Caves, as in (*b*.)

(*i*) The statute as in (*a*). See Jurid. Styles, 2. 94.

(*k*) Bell, Com. 1. 358; Bell, 14th Feb. 1727, M. 11,039; Drysdale, 25th Jan. 1839, F. C., D. B. M. 1. 409.

(*l*) M'Ranken, 24th Feb. 1714, M. 11,034.

(*m*) See Drysdale, as in (*k*). Written evidence apart from the deed was held relevant.

(*n*) Bell, Com. 1. 358; Hog and Co. 9th July 1765, M. 11,029; Howison, 7th Dec. 1784, M. 11,030.

(*o*) Bell, Com. 1. 357; Robertson, 3d Dec. 1736, Elch. *Cautioner*, 6. See Monro, 22d July 1741, M. 11,017, where the distinction is marked between an obligation *ad factum præstandum*, and an obligation to pay. The authority of the prior case of Stewart, July 1726, M. 11,010, is thus shaken,

(p) Ersk. 3. 7. 23; Bell, Com. 1. 357.

(q) Ersk. as in (p); Hope, 4th Feb. 1715, M. 11,009; M'Kinlay, 14th Feb. 1781, Hailes, 881.

(r) Bell, Com. 1. 357; Hogg, 13th June 1826, S. 4. 702. See Gallie, 4th March 1836, D. 14. 647.

(s) Ersk. as in (p); Millers, 19th Feb. 1762, M. 11,027.

(t) Anderson, 25th May 1821, F. C.

(u) Balvaird, 18th Jan. 1709, M. 11,005.

(v) Cuthbertson, 23d May 1823, S. 2. 330, and 2d edit. 291.

(w) Ballantyne, 21st Jan. 1708, M. 11,010; Muir, Jan. 1728, M. 11,014; Park's Crs. 16th Feb. 1785, M. 11,031.

(x) Balvaird, as in (u). See Stewart, as in (o).

(y) See Bell, Pr. 602; Com. 1. 357.

14. EFFECT OF DILIGENCE, &C. ON THE CAUTIONARY OBLIGATION.—(1.) The extinction of the cautioner's obligation, implied in the words of the act, that from and after the seven years, "the cautioner shall be *eo ipso* free "of his caution," has been considered more ample than that which follows upon the negative prescription of forty years, and not to be suspended by the minority of the creditor (*a*). (2.) According to the letter of the statute, the cautioner's liability for the sums falling due within the seven years, can only be preserved by diligence used within that time, "by inhibition, horning, adjudication, or "any other way," which, it is declared, "shall stand "good, and have its course and effect after the expiry of "the seven years;" and it is accordingly affirmed by Erskine (*b*), and after him by Ross (*c*), that no interruption except by diligence, and that only as respects the special subjects attached by the diligence, ought to preserve the debt from extinction at the end of that period. But this doctrine, although apparently deducible in strict construction from the words of the act, has not been sanctioned. The Court, whilst assuming that the operation of the statute is not merely prescriptive of the mode of proof, but causes a proper limitation of the obligation itself to a particular period (*d*), have construed its terms to imply not

a restriction to the legal effect of the specific kind of diligence used by the creditor, because some of the proceedings expressed in the act, (*e. g.* inhibition, which is merely prohibitory,) are incapable of being followed out; but that any sort of diligence, competent before the making of the act to interrupt prescription, shall save the creditor's right to what falls due within the seven years (*e*). That interest does not run upon the bond after that period has since been decided (*f*). Future interest may indeed be preserved by denunciation upon a horning within the seven years (*g*); a result which is a legal effect of the denunciation (*h*); and it may perhaps be assumed, that where the debt has been preserved by the statutory means, not followed by denunciation, the currency of interest would again begin so soon as a demand of payment had been made by action or diligence against the cautioner after the seven years. (3.) It has been held that the limitation, being statutory and absolute, cannot be directly renounced (*i*); although the cautioner may, by a separate and substantive obligation, corroborate the debt, or even by a promise of payment, or a request for delay, establish a personal exception to his pleading the statute (*k*). But mere acquiescence in the obligation, even by payment of interest after the seven years, will not revive the debt, the cautioner, if ignorant of his legal rights, having a claim of repetition, *ex conditione indebiti* (*l*). (4.) A decree (although in absence) within the seven years is equivalent to diligence (*m*); and the same effect was in one instance given to a depending process (*n*). (5.) But a mere citation on a summons does not operate as diligence (*o*). (6.) The period of endurance of the effect of diligence, or its equivalents, has not been determined. If a charge, or even the dependence of an action, be held to take the obligation out of the scope of the statute, then

the creditor has a ready means of evading the enactment, without reference to the terms of the obligation. But this consequence may perhaps be doubted, for the fidejussorial character of the party is not changed by means of the diligence or action. The obligation is still merely accessory to that of the principal debtor, and is liable to be affected by every circumstance that extinguishes or restricts the debt. The cautioner's future liability is thus inseparable from that of the party liable in chief, and cannot therefore, it is thought, be solely rested on the diligence or proceedings used to prevent the limitation, so as to be held to run a future course of prescription applicable to a newly constituted and independent claim. Still the question is apparently attended with difficulty, for it might on the other hand be urged, that the view adopted in the decided cases, of the cautioner's liability being cut short at the expiry of the seven years, and the sums previously falling due at the same time remaining a debt against the cautioner, is not easily reconcileable with the continued subsistence of an obligation as regards him, to the effect of limiting the claim so kept alive by diligence or action, to another term of seven years only, in place of the ordinary period of forty years. The notion, however, that a new course of the septennial prescription should run from the date of the diligence, or other step effectual to exclude the plea of prescription, is in no slight degree sanctioned by the decision in a case where the cautioner, by a written promise to pay, was held to have postponed the *terminus a quo*, from the date of the original obligation to that of the promise (*p*); and if this analogy be sanctioned, it will follow that action or diligence not obeyed operates against the cautioner as a mere personal exception to his pleading the limitation—a middle course, perhaps not ill-grounded, between the conflicting views that the septennial limitation is, by the plain terms of the statute, equally absolute as

the long negative prescription, but at the same time that diligence or action preserves the claim for forty years, and not merely secures the subjects thereby attached or affected, as affirmed by Erskine in the passage above cited.

(*a*) Ramsay, 26th Feb. 1706, 4 B. S. 644; Stewart, 10th Dec. 1712, M. 11,151-4.

(*b*) Ersk. 3. 7. 24.

(*c*) Ross, 1. 174.

(*d*) Semple, 24th Nov. 1741, B. S. 5. 713.

(*e*) Irving, 7th Jan. 1752, M. 11,043; Elch. *Cautioner*, 21. See note by Ivory, 174; Ersk. 770; Bell, Com. 1. 358; Hunter, 9th Jan. 1728, M. 11,041; Rowand, 17th June 1738, M. 11,041.

(*f*) Reid, 17th Feb. 1780, M. 11,043, Hailes, 850, after a hearing in presence. See Douglas, Heron and Co., 1st March 1793, M. 11,045-8, affd. on ap.

(*g*) M'Kilikin, 24th Feb. 1714, M. 11,040.

(*h*) See 1621, c. 20.

(*i*) Norrie, Feb. 1724, M. 11,013; Wallace, 13th July 1749, M. 11,026.

(*k*) Gordon, 19th Jan. 1715, M. 11,037; Douglas, Heron and Co., as in (*f*), and Bell, Com. 1. 358, note 8.

(*l*) Scott *v.* Yuille, 9th Feb. 1830, F. C. and S. 8. 485; affd. W. S. 5.

(*m*) Douglas, Heron and Co., as in (*f*). But this point was not determined in the House of Lords.

(*n*) Ewing, 20th July 1739, B. S. 5. 211; but see Bell, Pr. 603.

(*o*) Stewart, 29th Jan. 1712, M. 11,039; Bell, Com. 1. 358, note 11, on report of case of Clark, 10th March 1779, M. 11,043.

(*p*) Gordon, as in (*k*).

15. CLAUSE OF REGISTRATION (*a*).—1. *History.*—This important part of the bond is derived by Lord Kames from the English warrant to confess judgment. Mr Ross again deduces the clause of registration from the deeds of consent to excommunication common in the church courts in the fifteenth century, on which *letters of cursing* passed, and were, with the letters of caption following on them, almost the only compulsitor of payment till the Reformation, when the form was abolished by the Lords of the Congregation (*b*). Deeds came then to be produced for decree in the ordinary civil courts, and this took

place in presence of the judge. There was at that early period no regular registry of deeds. They were the warrants for summary decrees, and were preserved among the ordinary records of court. But the system was by degrees improved and simplified, until the appearance in court of the advocate or procurator for the party gave place to the simple form of presenting the deed to the clerk of court. For a long period, however, the clause was looked upon as a mere mandate, which, according to a rule introduced from the civil law, expired on the death either of the granter or creditor, and was incapable of being assigned, to the effect of authorising registration after the death of the latter, even although the assignation had been intimated during his lifetime (*c*). When the mandate expired, an *action of registration*, as it was called, became necessary (*d*). This inconvenience was removed, as regarded the creditor, by a statute, which permitted registration to pass summarily on production of the title of the holder of the obligation, whether the heir, executor or assignee of the original creditor; and by a subsequent statute it is declared that all *bonds, dispositions, assignations, contracts, and other writs registrable*, may be registered after, in the same manner as before the granter's death (*e*). In practice, the provision of the former of these acts, in regard to the production of the title of the party in right of the obligation, is disregarded, and deeds are registered, on being produced to the keeper of the register, as a matter of course.

2. *Meaning of the terms.*—The form of the clause of registration in use in Dallas's time is much simplified in modern practice. The words, "*and for the more security*," are now superfluous: it is no longer the decree, but the diligence on it, which gives a preference to the creditor in competition (*f*). The words, *in the books of Council and Session, or others competent*, were introduced about the year

1650. Prior to that period, the clause specified the different courts in which registration was authorised, whereby the debtor prorogated their jurisdiction; and the court, after the introduction of the general terms, held all these courts to be competent for registration, which had by the former practice been inserted (*g*). But this view was changed, and registration held incompetent, except in the jurisdiction where the granter resided (*h*). A question then occurred, with regard to the competency of the books of the Commissaries without special consent, even where the debtor resided within the particular commissariat, which was ultimately determined in their favour, and the decision was followed up by two acts of Sederunt. Thus the books of the Supreme Court, (of Council and Session,) and of the inferior courts of the Sheriffs and Commissaries, and of royal burghs, are all competent for registration under the clause as usually expressed; but those of the inferior courts, only when the obligants are, at the time, subject to their jurisdiction; and the books of the Commissaries are no longer competent for the registration of probative writs, or protests on bills and notes (*i*). The words, *therein to remain for preservation*, are of modern introduction, and entirely unmeaning, as the registration for execution necessarily implies the preservation of the deed. The real object of registration is expressed in these words, *that letters of horning, on six days' charge, &c. may pass upon a decree to be interponed hereto.* The days of charge in obligations have remained the same for a long period, and no attempt appears to have been made to limit them. Fifteen days are the *induciæ* in ordinary decreets, and are called the *days of law:* they are applicable to clauses of registration in which no period is specified. Although the clause of registration still contains a blank for the name of the procurator, and the extract issued by the keeper of the register bears his name and states his appearance, the act of registration is a mere fiction.

3. *Effect.*—(1.) The forms of diligence warranted by the clause of registration against the person and property of the debtor will be found in the Juridical Styles, (vol. 3.) and in a recent statute, which renders a summary charge competent in virtue of the extracted decree, but without superseding letters of horning, when this form is preferred by the creditor; and a relative act of Sederunt (*k*). (2.) The force of this clause depends upon the consent of the granter of the deed, who can renounce only for himself the ordinary forms of law; consequently the effect of the clause as a consent to summary diligence is lost by the death of the original obligant; and heirs and executors must be proceeded against by ordinary action of constitution. (3.) An apparent exception to this rule maintains in the case of copartneries; a valid obligation with consent to registrate for summary diligence, being effectual to bind future partners, on the principle, that the consent of the company is the consent of all those who may, at any time during the currency of the obligation, form its individual partners (*l*). (See below, *Bond of Credit.*)

(*a*) (*Clause from Dallas*, p. 1. and 697.) And for the more security I am content and consent thir presents be insert and registrat in the books of Council and Session or others competent to have the strength of an decreet of the Lords or Judges thereof interponed thereto that letters of horning on six days and others necessar in form as effeirs may be direct hereupon; and to that effect constitute my procurators, &c. (*Modern Clause, Jurid. Styles*, 1. 295.) And I consent to the registration hereof in the books of Council and Session or others competent, therein to remain for preservation, and if necessary that letters of horning on six days' charge and all other legal execution may pass upon a decree to be interponed hereto in form as effeirs; and for that effect, I constitute my procurators, &c.

(*b*) Ross, 1. 96, *et seq.*

(*c*) Channel, 16th Feb. 1693, M. 839.

(*d*) Ersk. 4. 1. 63.

(*e*) 1693, c. 15; 1696, c. 39.

(*f*) See Ross, 1. 112.

(*g*) Douglas, Feb. 1674, B. S. 3. 47.

(*h*) Morris, 21st July 1677, M. 7426.

(*i*) Com. of Edin. 16th Dec. 1748; Elch. *v. Register*, 8; A. S. 17th Dec. 1748, and 29th July 1752; Ersk. 1. 5. 30; 49 Geo. III. c. 42, § 2.

(*k*) 1 and 2 Vict. c. 114; A. S. 24th Dec. 1838.

(*l*) Maclean, 9th Dec. 1836, F. C., D. 15. 236.

16. TESTING CLAUSE.—This clause is in the ordinary form. The personal bond is not a privileged writ, and must therefore be authenticated according to the statutory rules (*a*). It is true that cautionary obligations are in one sense privileged, that exceptions arising out of defects in their attestation may be excluded, in certain circumstances, by homologation or *rei interventus;* but it is not the province of the conveyancer to consider by what means an informal deed may be validated, but in what way deeds may be formally executed.

(*a*) See Duff, Feud. Conv. 1. *et seq.*

## TITLE III. BOND OF CREDIT.

17. ORIGIN AND PURPOSE.—(1.) The bond of credit is a deed extensively used in banking operations in Scotland, and although not peculiar to this country, it may be considered, in one department of such business, as characteristic of our system. Cash-credits have been the means of fostering the trade and resources of Scotland in a greater degree than any other branch of banking. On the one hand, they are highly beneficial to the banks, as a profitable employment of capital at interest; and on the other to the customers, as forming a source of permanent credit, so long as the transaction is found to be for mutual advantage. By enabling traders and others to draw out and replace, day by day, such sums as are required or received in the course of business, they produce both safety and economy; but the leading feature of cash-credits consists in the feeling of confidence which they give to those having

the credit, that within a certain fixed amount their drafts will be honoured by the bank, without exposing them to the harassing form of discounting bills, or otherwise negotiating daily loans for the ordinary purposes of a trade or profession. (2.) The credit bond is thus of modern introduction, and its form has only within a comparatively recent period been brought to perfection. It is framed to meet the purposes and mode of operation of the cash-credit, having the double effect of fixing a sum beyond which the account cannot extend, and securing within this limit, by the operation of the guarantee, a capital sum fluctuating in amount with each individual advance or repayment; but which, at the pleasure of the bank, not acting capriciously, but guided by certain professional rules, may be declared at any instant of time to be fixed and liquidated, so as to warrant the most summary diligence which the law allows to any creditor by bond. (3.) The bond of credit, from its nature and object, unites the principles of the personal bond and the mercantile guarantee. It is a joint and several obligation by all the parties for the sum expressed as the limit of the credit; and, on the other hand, a guarantee by all but one, for any amount within that limit, with the lawful interest on each advance, that shall be found, at closing the account, to have been drawn out by the remaining obligant, to whom accordingly the power of operating on the account is confined. And for greater safety to the bank, it is intrusted with the important privilege of declaring or liquidating the balance due at any point of time as appearing on the books, by its own act, a privilege which it cannot be for the interest, as it has never been found to be the desire of any bank to abuse.

18. CLAUSES OF THE BOND OF CREDIT.—These are, 1. *The Inductive Clause.*—2. *The Obligatory Clause.*—3. *Clause authorising the bank to declare a balance.*—4. *Clause*

*excluding suspension unless on consignation.—5. Clause of Registration.—6. Testing Clause.*

19. INDUCTIVE CLAUSE (*a*).—In the modern form of the bond no distinction is made, either here or in the terms of obligation, among the parties who obtain the credit: they are all set forth as obligants in the same character and degree.

(*a*) We, A. and B., considering that the company in Edinburgh have agreed to allow us credit upon a current account to be kept in their books in name of me, the said A., to the amount of L. sterling, upon our granting these presents.

20. OBLIGATORY CLAUSE (*a*).—1. *General effect.*—(1.) By the usual form of this clause, the parties become bound as co-principals, jointly and severally; and thus, according to rules above explained, they renounce the privileges of discussion and division; (above, § 12.) (2.) It is unimportant to inquire whether the septennial limitation be excluded by the terms employed: the nature of the bond, as being a security having reference to a course of years, excludes the plea of prescription; (above, § 13).

2. *Extent of the security.*—(1.) By the terms of the bond, the engagement covers drafts on the account, which are the legitimate mode of operating upon it. (2.) It covers likewise duly negotiated bills on which the name of the party having the credit appears, and that although these have not been entered in the account kept in his name in the books of the bank, the purpose of the bond being to bring within the guarantee the whole of the party's ultimate responsibilities under obligations existing during the currency of the account (*b*). But mere law expenses incurred in relation to bills which, unless admitted, form an illiquid claim until taxed or otherwise validly ascertained, cannot *de plano* be introduced into the account (*c*). (3.) Periodical interest upon each separate advance is due

under the terms of the obligation; and on the analogy of the general rules of banking business, the interest thus due may be accumulated at the end of each year with the principal sum, so as to bear future interest (*d*).

3. *Description of the parties, (creditors.)*—In as far as relates to an individual creditor or obligant, reference is made to the ordinary form of the personal bond; (above, § 10, 11). Cash-bonds being very commonly granted either by or to copartneries, it is of importance to inquire by what terms a company may be effectually obliged or made a creditor by bond. (1.) As respects the right of action, an obligation conceived in favour of a company, whether designated by a descriptive or social firm (*e*), is effectual to found a claim against the granter. Thus, a bond in favour of the Clyde Shipping Company, an example of the former, or Sir William Forbes and Company, an example of the latter, would form a valid obligation on the debtor; although, in proceedings by action at law to enforce the obligation, it has been held, on a distinction perhaps not very philosophical, that the descriptive firm has no *persona standi;* but that it belongs to the proper firm, because by it are the company obliged; although in many cases, *e. g.* the well-known instance of Bell, Rannie and Company, there is no partner of either name in existence (*f*). In order to perfect the instance, there must be added to the descriptive firm the names of all or some of the partners (*g*). (2.) As respects the privilege of summary diligence the rules are similar (*h*); nor has it yet been determined that a consent by the debtor in a bond granted to a company having a descriptive firm, to diligence at the instance of such firm, would sanction a charge given without the concurrence of one or more partners, although it would probably be held that such consent is sufficient to supply the instance wanting at common law (*i*). And, on the other hand, it may perhaps be assumed that partners signing a de-

scriptive firm, and thus obliging the company, might competently be sued or charged under such designation alone, in the same manner as the partners of a proper firm; (below, Art. 4.) But the safe course is to take such bonds in favour of the company and one of their officers, usually the cashier, and his successors in office, for behoof of the company, at whose instance, jointly with the firm, or with the individual partners, it has been held that diligence may validly proceed (*k*). (3.) In order to exclude any plea on the part of the cautioners, arising out of changes in the company by the death or retirement of old, or the assumption of new partners, the cash-bond should bind the whole obligants to pay *to the company, and the individual partners presently existing, or who shall form the company at any period during the currency of the account.* (See below, Art. 4.)

4. *Description of the parties, (debtors.)*—The converse of the rules which govern the question, in what form a company can sue diligence or maintain action, applies to the case of a company coming under obligation. (1.) Thus, a company having a social firm may be sued by that firm alone; whereas to a descriptive firm must be added the names of all or some of the partners (*l*). (2.) In like manner it has been held that summary diligence is competent in a similar form (*m*). (3.) The form of the obligation ought to be adapted to the distinction which thus maintains between a descriptive and a proper firm. Under the latter, the bond will be granted by the firm, A., B. and Company, who will bind *the company and its individual partners, present and future;* but under the former, either by the directors, manager or cashier, as authorised to that effect by the company, or by the whole individual partners; and the obligation in the same manner will be on the *individual partners present and future* (*n*). It would seem, however, to result from the decision in the case last referred

to, that future partners are subject even to summary diligence without an express obligation on them in the bond; for they are unquestionably liable, on the principles of partnership, as consenting to the obligations of the firm, in the form of ordinary action; and the decree of registration on the bond proceeding upon the consent of the company, appears to be considered equivalent to an ordinary decree. (4.) The distinction already noticed between the legal standing of the two descriptions of companies, being founded chiefly on the use of the firm in granting obligations by companies having a proper firm, and not in the general case by those having a descriptive firm, it is thought, that where this is practised by a company of the latter sort, as, it is believed, is occasionally done, the distinction would probably be held inapplicable (*o*).

5. *Privileges of joint stock companies.*—(1.) By a statute of Geo. IV. joint stock banking companies in Scotland were authorised to sue and be sued in the name of one of their principal officers, under the provision that they should annually enter at the Stamp-Office in Edinburgh, upon oath, the name and firm of the company, the names and places of residence of the partners, and the name and place of abode of such officer (*p*). It was competent for a banking house to adopt the provisions of this act for the purpose of winding up its affairs after closing business (*q*). (2.) More recently a general statute has been enacted, conferring power on the Crown to grant by letters-patent, without incorporation, certain privileges to joint stock companies in any branch of trade (*r*). Among these is the privilege of suing and being sued in the name of one of two officers to be appointed and registered in a form prescribed by the act. (3.) But although diligence or action must, under the statute, be in name of one of the appointed officers, it is thought that obligations may be conceived in favour of a bank by its de-

scriptive firm only. Unless this result should follow, the statute, in the matter of action and diligence, will confer no privilege that is not competent at common law; (above, Art. 3.)

6. *Rights and liabilities of the cautioners and their representatives.*—These, in a general sense, depend on the ordinary rules of law. The following specialties may be observed: (1.) A cautioner will not be relieved of his obligation by a change in the partnership of a banking house, whether private or constituted as a joint stock company (*s*); but it is customary to introduce a stipulation in the bond to meet the contingency (*t*). (2.) A cautioner for a company will be freed by a change in the partnership of such company, although the firm should continue to be used, provided that special notice of the change have been given to the bank (*u*). (3.) It has been held that there are no grounds for excepting the representatives of cautioners in bonds of credit from the operation of the ordinary rules of law: they are liable for the future operations on the account, whether the original debtors be regarded as co-principals, bound expressly as such, or as proved by the nature of the transaction to be proper cautioners (*v*).

(*a*) Therefore we, the said A. and B., hereby bind and oblige ourselves, conjunctly and severally, and our heirs, executors and successors whomsoever, to content and pay to the said Company, and C., their present manager, (or cashier,) and his successors in office, (or the officer of the said banking company for the time being, who shall be registered under the provisions of the statute made thereanent, and the charter of incorporation of the said company,) for behoof of the said company, the aforesaid sum of L. or such part or parts thereof as I, the said A., shall value for or draw out by orders or drafts on the said company, or their cashier, in virtue of the foresaid credit, and also such sum or sums of money as the said Company shall stand engaged for on account of me, the said A., by accepted or discounted bills, letters of credit, guarantees, or in any other manner of way, not exceeding the said sum of

L. over and above what of the proper funds of me, the said A., may happen to be lodged in the said cash-account, and that at any time when the same shall be demanded, after six months from the date hereof, with the legal interest thereof from the time of the advance until the same is repaid, and a fifth part more of the said principal sum of penalty in case of failure, or proportionally effeiring to the sum due at the time.

(*b*) Liddell against Sir W. Forbes and Co. June 1820, Bell, Com. 1. 369.

(*c*) Paisley Union Bank, 24th Feb. 1831, S. 9. 488.

(*d*) Cruickshanks, 26th Nov. 1834, S. 13. 91.

(*e*) Lord Glenlee, in Maclean, 9th Dec. 1836, F. C., D. 15. 236, thus explains the distinction: The distinction between a proper and descriptive company consists in this, that there are proper companies, though they do not contain any of the individuals alive whose names were contained in the original firm. It is a proper firm, and has a *persona standi*. A descriptive firm, again, unless it be a corporation, may be said to have no existence.

(*f*) Culcreuch Cotton Co. 27th Nov. 1822, S. 2. 47; Bell, Com. 2. 629; Clyde Shipping Co. 8th June 1839, F. C., D. B. M. 1. 901; Thomson, 30th Nov. 1836, F. C., D. 15. 173.

(*g*) See Scott, 23d Feb. 1827, S. 5. 413; Shotts Iron Co. 19th June 1828, S. 6. 399.

(*h*) Wilson, 20th Jan. 1836, D. 14. 262.

(*i*) See Fisher, 2d Dec. 1828, F. C., S. 6. 217. The question was here put to the Judges, but waived, as the terms of the bond were otherwise held sufficient to validate the charge complained of.

(*k*) Fisher, as in (*i*); Paisley Union Bank, as in (*c*). The clause in Fisher was in these terms: "To content and pay to the said Perth Union "Bank, or to the said John Syme, their cashier, or to his successors in "office, for behoof of the said bank and their foresaids," &c.

(*l*) Forsyth, 18th Nov. 1834, S. 13. 42; Pollock, 28th Jan. 1828, in House of Lords, S. and W. 3. 365; Gavin, 17th Feb. 1827, F. C., S. 5. 375; Lord Moncreiff, in Maclean, as in (*e*).

(*m*) Maclean, as in (*e*).

(*n*) Maclean, as in (*e*).

(*o*) See Lord Jeffrey's note in Clyde Shipping Co. as in (*f*); but there the company firm was not in use to be subscribed, and thus the distinction was applicable.

(*p*) 7 Geo. IV. c. 67.

(*q*) Cheyne, 26th Nov. 1828, F. C., S. 7. 60.

(*r*) 1 Vict. c. 73.

(*s*) Bell, Com. 1. 370.

(*t*) And it is farther provided and declared, that notwithstanding any change in the partners of the said C., D. and Co., this bond and obligation shall continue effectual, and the obligants shall be liable to the company continuing to carry on business under the said firm of C., D. and Co. for all advances to be made to the said E. F., or obligations undertaken by them for him as aforesaid, in the same manner as if no change had taken place amongst the members composing the said firm, and as if the present partners thereof, and none other, had continued to constitute the whole partners of the company.

(*u*) Bell, Com. as in (*s*); Speirs, 22d June 1822, F. C., S. 1. 516. Notice by advertisement, even in a newspaper alleged to have been taken in by the bank, was held not relevant, special notice not being averred. In Bank of Scotland *v.* Padon, 21st Dec. 1826, F. C., S. 5. 175, notice of the retirement of a partner made by circular letters, one of which was sent to the bank, was sustained; but a clause such as the following is advisable in practice: "And it is farther expressly provided and declared, that notwithstanding any change in the partners of the said C., D. and Co., this bond and obligation shall continue effectual, and the said obligants shall be liable for all advances made to the said firm or company of C., D. and Co., or obligations undertaken for them by the said banking company as aforesaid, in the same manner as if no change had taken place in the members of the said C., D. and Co., and as if the present partners thereof had continued to constitute the whole partners of the company, it being hereby expressly stipulated and agreed that the said banking company shall not be affected by any death, contingencies, casualties or changes which may occur in the said C., D. and Co., unless notice thereof be given to them notarially."—*Note.* The form here exemplified may be combined with that at (*t*), when the company giving the credit is not incorporated.

(*v*) Commercial Bank of Aberdeen, 4th Feb. 1801, Bar. Hume, p. 88; Paterson, 5th July 1808, M. App. *Society*, No. 4; Note by Ivory, 176, Ersk. 683. See University of Glasgow, 18th Nov. 1790, M. 2106.

21. Clause authorising the creditors to declare a balance (*a*).—(1.) This part of the bond of credit is of essential importance to the privilege of summary diligence; because, without a formal liquidation of the amount due under the bond, either by decree or the consent of the debtor, such would be unwarranted. The clause has been sustained as effectual for this purpose, on the principle of consent, the act of the creditor in declaring the balance being thus in law the act of the debtor, although, in equity,

the latter is allowed the remedy of suspension or reduction for correcting an erroneous exercise of the power. A result, perhaps more questionable, is the determination that the registration of the bond alone (and not also of the stated account) is sufficient to warrant a charge on the decree of registration, for the balance can be held as liquidated on the *ratio* solely, that the account, in virtue of the debtor's consent, is imported into and forms a component part of the obligation (*b*). (2.) The form of the certificate by the officer of the bank agreed upon as the person who shall act under the mandate of the debtor, may be by his dating and subscribing the account, which implies a statement of its correctness (*c*). (3.) Summary diligence is plainly incompetent, even against the party having the credit, for any sum beyond the amount of the sum expressed in the bond and interest on the periodical advances. When, therefore, the credit has been overdrawn, the superadvances can be made good only by ordinary action; but, as against cautioners, it is hardly necessary to observe, that such do not form a valid claim (*d*).

(*a*) And it is hereby declared, that a stated account made out from such orders or drafts as shall be drawn by me, the said A., as aforesaid, and from the books of the said company, in as far as respects what they may otherwise stand engaged for on account of me, the said A., or have a valid claim for against me, as above mentioned, and signed by their accountant with reference to this bond, shall be sufficient to constitute and ascertain a balance and charge against us.

(*b*) Fisher, 2d Dec. 1828, F. C., S. 7. 97.

(*c*) Paisley Union Bank, 24th Feb. 1831, S. 9. 488.

(*d*) The form of horning on a cash-credit, at vol. 3. of the Jur. Styles, pp. 613-15, is liable to mislead. See observations at p. 615.

22. CLAUSE EXCLUDING SUSPENSION, UNLESS ON CONSIGNATION (*a*). — This clause has been invented, on the principle that a debtor has, in certain cases, the power to renounce defences and exceptions competent to him at common law; but effect has not been given to it by the

Court. A very marked distinction prevails between the renunciation of exceptions affecting a party, in a patrimonial sense, and such as would necessarily lead, if supported by the authority of a decision of the Court, to the limitation of the powers of the Judges in the application of legal remedies. The renunciation, for example, of the privilege of discussion, by a cautioner, affects himself only, and not the powers of the courts of law; because the privilege is within the extent of liability which any one may undertake; and when renounced, it just leaves the cautioner a full debtor. The same holds good of the renunciation of the terce, *jus relictæ*, *jus mariti*, or the like. But the effectual renunciation of the right of suspension upon caution, or without caution, as the Court may determine, would control the powers of the Judges, and necessarily lead to still more stringent stipulations between debtors and their creditors, at the dictation of the latter; for it is the creditor who lays down the terms of a transaction; and if suspension in one form might be excluded, so, on the same principle, might suspension in any form, or indeed any remedy at law whatsoever (*b*).

(*a*) And no suspension shall pass of a charge so constituted and ascertained, but on consignation only.

(*b*) Forrester, 27th June 1815, F. C. See opinion of the late Lord Meadowbank.

23. CLAUSE OF REGISTRATION. } These are expressed in
24. TESTING CLAUSE. } common form; (above, § 15, 16). The deed, not being privileged, must be executed with the usual solemnities.

## TITLE IV. BONDS FOR THE FAITHFUL DISCHARGE OF AN OFFICE.

25. GENERAL NATURE OF BONDS FOR FACTORS, BANK AGENTS, &c. (*a*).—This class of deeds falls within the description of prospective or continuing securities, in regard to which the following specialties require notice: (1.) The character of securities of this kind being prospective, an obligation for future transactions only would probably be presumed where past transactions are not expressed (*b*); but as the point is not clear, it is the duty of the conveyancer, on the one hand, to restrict the liability to future intromissions, when these only are meant to be covered; and, on the other, to extend it in express words to past, if such are in the contemplation of the parties (*c*). An engagement, *e. g.* for a factor having particular reference to rents, &c. payable under specified leases, will not cover sums collected by him due by other modes of constitution (*d*). (2.) A distinction has been indicated between the case of a cautionary obligation, *e. g.* for a bank agent, in security of intromissions, by which the undertaking of the cautioner is limited although not the extent of the intromissions, and that where the intromissions themselves are restricted to the specific sum guaranteed by the cautioner. As the former does not tie down the bank, as in a question with the cautioners, to a particular limit of credit to the agent, it is regarded as a *covering* security, under which the bank may come against the cautioners without giving them the benefit of the dividend obtained from the estate of the agent, upon the sum for which they are bound (*e*); not so the latter (*f*). Although the distinction does not appear to be supported by the case relied on by Mr Bell (*g*), yet, as being indicated by so high an authority, it

ought to be in the view of the conveyancer in preparing or adjusting a deed of this description. (3.) It has been held that the obligation undertaken by cautioners in this class of bonds transmits against representatives, even for future liabilities; and therefore it must be so stipulated, when it is intended that these shall not be liable beyond the balance existing at the time of the cautioner's death (*h*). (4.) The liability under such obligations being prospective, and not as for money instantly advanced, they are excluded from the scope of the septennial limitation; (above, § 13. 3). (5.) By the ordinary tenor of this class of bonds, the privileges of discussion and division are renounced; (above, § 12, 2).

(*a*) Jur. Styles, 2. 62. et seq.

(*b*) Dykes, 3d June 1825, 4 S. 69. The position in the text seems to be supported by the decision in this case, which related, however, to a mere letter of guarantee. See, on the other hand, Mag. of Edin. 1st Aug. 1766, Hailes, 109.

(*c*) The following clause is taken, with but slight variations, from the case of Smith, 14th Jan. 1829, F. C., S. 7. 244. And farther, it is hereby provided and declared, without prejudice to the generality foresaid, that the said whole obligants before named, along with the obligants in the bond before mentioned, (viz. the original bond of caution,) shall, jointly and severally, take upon us the sole risk of all bills, promissory-notes, and other obligations of every kind already discounted by me, the said A., and of all transactions made by me while I have acted as agent for the said bank, and also of all bills, promissory-notes, and other obligations of every kind to be hereafter discounted by me, the said A., and of all bills on London or elsewhere, which I, the said A., shall discount or purchase in the execution of the above office and trust; so that, in case of any loss by bad debts, or bills which have been or may happen to be purchased or discounted by me, or upon any other obligation, in whatever form granted or received by me, as agent foresaid, such loss shall fall upon and be sustained by me, the said A., and by us, the said co-obligants before mentioned, all jointly and severally, and no part thereof shall be sustained by the said governor and company.

(*d*) University of Glasgow, 18th Nov. 1790, M. 2104.

(*e*) Maxton, (or Perth Bank,) 17th Jan. 1777, B. S. 5. 408; M. App. *Cautioner*, No. 1; Borthwick, 29th Jan. 1819, F. C., affd. 27th March 1822, S. 1. 131.

(*f*) Bell, Pr. 289.

(*g*) Kinrosse, 18th Dec. 1677, B. S. 3. 212; Bell, Pr. as in (*f*).

(*h*) University of Glasgow, 18th Nov. 1790, M. 2106; Bell's Cases, 134. Dudgeon, 1st Dec. 1813, Bar. Hume, 102.

## TITLE V. BOND OF RELIEF.

26. History.—(1.) The obligation by the principal debtor in a bond to relieve his cautioners appears at an early period to have been contained in a clause inserted in the principal deed. So late as the Compilation of Dallas of Saint Martin's, we find no separate bond of relief. The right of the cautioner to enforce the obligation of relief at that period emerged only after he had paid or been distressed for the debt, unless the debtor were *vergens ad inopiam* (*a*). A charge of horning was held to constitute distress (*b*); and more recently the mere registration of the bond in a competent register for diligence (*c*). At these latter periods the cautioner had the means of enforcing the clause of relief, by obtaining an extract of the bond thus registered by the creditor; but for some reason which is not very clear from the authorities, the practice was introduced of the cautioner taking an obligation of relief in a separate form. It seems probable that it originated in an attempt, which appears to have at first been successful, to enforce relief by means of diligence before actual distress, and a clause was introduced into the obligation thus separately granted, binding the debtor to satisfy the debt before the term of payment expressed in the principal bond, and thus to relieve the cautioner (*d*). But we find that adjudication in security, although in one instance allowed to pass upon a mere clause of relief (*e*), was in the following year refused even upon a separate bond of relief, unless the cautioner had made payment or been distressed (*f*). (2.) Hence an alteration on the form of this obli-

gation became desirable, and the first improvement was a clause binding the debtor to produce to the cautioner the principal bond unregistered, or a full and sufficient discharge of the debt. The next step was to add a clause, binding the debtor to pay to the creditor the principal and interest contained in the original bond, and to deliver to the cautioner, at a term certain, "his subscription there-"from, or otherwise a sufficient discharge thereof" (*g*). But as this still amounted to no more than an obligation *ad factum præstandum*, and although effectual for diligence against his person, could not authorise poinding or arrestment of the debtor's goods, or adjudication of his estate, the security of the cautioner continued incomplete. A clause was accordingly devised, giving power to the cautioner of enforcing payment to himself of the sums in the principal obligation, in order to enable him to operate his own relief; and in this manner, about a century ago, the bond of relief acquired a form which is still preserved with but slight modifications.

(*a*) Stair, 1. 17. 13; Ersk. 3. 3. 65; Thomson, 19th Jan. 1627, M. 2113, where this was assumed.

(*b*) Tenants of Hayning, 28th July 1625, M. 2113.

(*c*) Vaus, 26th March 1628, M. 2114.

(*d*) Paton, 7th July 1688, M. 2119. See Ross, 1. 168.

(*e*) Burnett, 20th Nov. 1685, M. 2121.

(*f*) Dickson, Nov. 1686, M. 2121.

(*g*) Spottiswoode's Styles, (5th edit.) 120-1.

27. FORM AND EFFECT.—1. *Form of the bond* (*a*). (1.) The modern bond of relief thus differs considerably from that in use when the deed first came into practice. Dallas, as above observed, gives no separate example of an obligation of relief; but in Ross's Lectures will be found what he understood to have been its earliest style (*b*). It merely bound the debtor to "warrant free and relieve harmless, "and skaithless keep" the cautioner of his obligation,

"and of all cost, scaith or damages he may happen to "sustain and incur therethrough any manner of way," and differs in no essential particular from the obligation of relief contained in Dallas's personal bond. The competency of using diligence on an obligation in that form must have been very doubtful. (2.) The improved clauses afterwards introduced, obliging the debtor to deliver up the principal bond retired, or to pay to the cautioner at a particular term, are substantially embodied in the present form, which expresses, *first*, the obligation of relief, and, *secondly*, the mode of relief, by either making payment to the creditor, and delivering up the bond retired and discharged, or paying the contents to the cautioner himself as creditor in the bond of relief, in order that he may operate his own relief (*c*). The deed concludes with the usual clauses of registration, &c. Mr Ross observes, in reference to the modern form of the bond as given by Spottiswoode, that the "cautioner's demand of payment is only made condi-"tional upon the debtor's failure in retiring the bond, "whereas it ought to have been unconnected with the "prestation of the facts, and entirely optional to the cau-"tioner himself," a criticism which seems just, and is equally applicable to the form exemplified in the Juridical Styles, and suggests an alteration which is shown in the form given below (*d*).

2. *Effect.*—(1.) A clause or separate obligation of relief is not in all cases essential to found a claim of relief, which is competent to a cautioner before payment or distress, by way of action at common law, when the debtor is *vergens ad inopiam*, or the principal obligation is prospective and indefinite as in cautionary for the due performance of an office (*e*). (2.) But a bond of relief is a convenient form for giving powers to a cautioner, by means of diligence, to act summarily in securing his relief where circumstances call for expedition. (3.) The cautioner

has an interest, prior to payment, to enforce implement merely of the principal obligation; and although he obtains an engagement by the debtor to pay to himself, in order that he may operate his own relief, this is plainly meant solely for the purpose of diligence, which can only pass on a liquid obligation; and it is not to be doubted, that any capricious use of diligence by the cautioner would be discouraged by the Court. A cautioner, therefore, before making payment, can have no right to demand that the money shall be placed in his own hands when the debtor is ready and willing himself to settle with the creditor. (4.) But after distress, or when diligence has become expedient for his safety, the cautioner may, under the penalty in his bond of relief, recover the expenses which he has necessarily incurred; (above, § 10. 5.); but he has no right to expenses sustained in resisting payment on frivolous grounds, or of diligence which he has allowed to pass against his estate (*f*). (5.) And after payment the cautioner has a claim for reimbursement not only of the principal, interest and necessary expenses, but of interest upon the interest so advanced by him; for although by an old act of Sederunt, quoted by Ross as passed in 1610 (*g*), the Court declared the terms *cost, skaith, damages, expenses and interest*, to mean the principal sum advanced by the cautioner, with annualrent upon the principal till repaid, a more equitable rule has since been recognised in repeated instances (*h*). (6.) A bond of relief does not bring a nominal co-principal within the scope of the septennial limitation of cautionary obligations, unless duly made known to the creditor; (above, § 13. 2.)

(*a*) I, C., CONSIDERING that A. B. and I, the said C., by our bond, dated, (*bond narrated,*) as the said bond in itself more fully bears: AND SEEING that the said principal sum of L.. sterling contained in the said bond was wholly received by me, the said C., and applied to my proper use and behoof, and that the said A. and B. became bound in manner

above mentioned, at my desire, and on my agreeing to relieve them, in manner under written: THEREFORE I, the said C., bind and oblige myself, my heirs, executors and successors whomsoever, to WARRANT FREE and RELIEVE, HARMLESS and SKAITHLESS KEEP the said A. and B., their heirs, executors and successors, of and from payment of the several sums of money contained in the said bond, and of the said bond itself, and of all cost, skaith, damage, interest and expenses that they and their foresaids shall sustain thereby, and FOR THAT EFFECT to make payment against the said term of next to the said D. of the foresaid principal sum of L. interest that shall then be due thereon, and liquidated penalty that may be incurred, and to procure and deliver up to the said A., (or B.,) for himself and for behoof of the said B., (or A.,) the said bond if unregistered retired and discharged, or if registered a sufficient discharge thereof; or, AT THEIR OPTION, to make payment to the said A. and B., at the last-mentioned term, of the foresaid principal sum of L. sterling, interest due thereon, and liquidated penalty that may be incurred, with such other expenses as the said A. and B. may have sustained in consequence of becoming bound as aforesaid, in order that they may themselves pay the said several sums due to the said D., and thereby operate their own relief. And farther, I hereby become bound to make payment to the said A. and B. of the penalty of L. sterling in case of failure, over and above performance. And I CONSENT, &c.

(*b*) Ross, 1. 162.

(*c*) See form, as in (*a*).

(*d*) See form, as in (*a*).

(*e*) Ersk. 3. 3. 65; Taylor, 3d July 1818, Bar. Hume, p. 114. The cautioner must give timeful notice, and allow a reasonable period for finding new caution, or for the principal to find a new agent, &c.; Kinloch, 13th June 1822, S. 1. 491. See Alston, 2d Dec. 1828, S. 7. 112; Spence, 13th Dec. 1834, S. 13. 199.

(*f*) Ersk. 3. 3. 65, 86.

(*g*) Ross, 1. 165. This is not amongst the printed acts.

(*h*) E. of Wemyss, 16th July 1670, B. S. 2. 494; Inglis and Weir, 23d June 1825, F. C., S. 4. 113. See Ford, 7th July 1801, M. App. *Annualrent*, No. 3.

## TITLE VI. BOND OF CORROBORATION (*a*).

28. FORM AND EFFECT.—(1.) Bonds of corroboration are applicable to a variety of situations. A debtor with or without a cautioner may, in consideration of a certain

delay in payment of the debt, corroborate a prior obligation by a new bond bearing reference to the old, and accumulating the principal and bygone interest into a capital sum to bear interest for the future; or a cautioner may come forward on behalf of the debtor in a bond, and for the same consideration corroborate the debt; or the representatives of a debtor may grant a new obligation with or without caution, in order to avoid the expense of judicial proceedings for constituting the claim; or the debtor may grant a new bond to the representatives of the creditor, for the purpose of superseding confirmation. These and other examples of this form of obligation are given in the Style book (*b*). (2.) The bond of corroboration, as its name imports, is a subsidiary obligation; and as it necessarily bears a date subsequent to that of the principal bond, a cautioner in it has not the benefit of the septennial limitation; (above, § 13. 2, 3). (3.) It follows, that when a new bond is taken from the principal debtor and a cautioner, in terms falling within the scope of the statute, and not bearing reference to the old, which is therefore innovated, such cautioner will have the same privileges as a cautioner in any other original obligation. It is thus convenient, in order to exclude the limitation, to frame a new obligation for an old debt in a proper corroborative form; and as the ratio on which the exclusion takes effect depends on the existence of a former bond or contract, the privileges of a cautioner, in a bond corroborative of a debt constituted by decree or bill, will not be affected by the merely corroborative form of the deed. Other means must in this case be adopted to exclude the limitation; (above, § 13. 2). (4.) It is another reason for adopting the corroborative form, that where diligence has been raised, it would otherwise be affected by novation, and the former obligation entirely superseded (*c*).

(*a*) I, A., CONSIDERING that I, by my bond dated for the causes therein specified, bound and obliged myself, my heirs, executors and successors whatsoever, to make payment to B., his heirs, executors and assignees, of the principal sum of L. sterling, and that at the term of 184 , with the sum of L. sterling of liquidated penalty in case of failure, with the legal interest of the said principal sum from the date of the said bond to the foresaid term of payment, and half-yearly, termly and daily thereafter during the not payment of the same, as the said bond more fully bears: And also CONSIDERING that the said principal sum, with the interest thereof from the term of , amounting together, at the date hereof, to L. sterling, are unpaid, and NOW SEEING that, on condition of my granting these presents, the said B. has agreed to supersede payment of the said accumulated sum to the term after mentioned: THEREFORE, and in corroboration of the said bond, and without prejudice thereto, or to any diligence thereon, past or future, *sed accumulando jura juribus*, I bind and oblige myself, my heirs, executors and successors, at the term of next, to make payment to the said B., his heirs, executors or assignees, of the said accumulated sum of L. with the sum of L. sterling of liquidate penalty in case of failure, and the legal interest of the said accumulated sum from the date hereof to the said term of payment, and thereafter during the not payment thereof, and that at two terms. (*The conclusion follows the terms of an original bond.*)

(*b*) Jur. Styles, 2. 42. et seq.

(*c*) Ersk. 3. 4. 22.

29. RELIEF COMPETENT TO A CAUTIONER.—The question to what extent, and against what parties a cautioner in a bond of corroboration has a right to relief *ex lege*, is of much importance in reference to the stipulations which it may be for his interest to make, prior to coming under the engagement. (1.) The rules on this subject, as stated by Erskine (*a*), are not now recognised. It is one of no little intricacy, arising from the conflicting views of the Judges, although in the greater number of the decided cases, which are chiefly of old dates, the actual results seem in general to be consistent. Probably the clearest enunciation of the principle on which such questions depend, is made by Lord Kilkerran (*b*) in these words, "that "the equity on which the relief among cautioners is found-"ed, obtains no less when they are bound in different

"deeds and at different times, than when they are bound "in the same deed;" and accordingly it seems generally to be conceded, that the presumption is in favour of rateable relief among cautioners in original and corroborative obligations (*c*). But there are circumstances of common occurrence sufficient to overcome this presumption, and entitle the cautioner in the subsequent engagement to a total relief from the prior cautioners, and those are plainly the strongest and least deceitful which arise on the form or terms of the corroborative deed. (2.) Thus, although the grounds of determination have differed, it has been a uniform result to award total relief to the new cautioner, when the corroborative obligation has been granted by him and the prior cautioner, whether with or without the concurrence of the principal debtor as a party to the deed (*d*). And on the other hand, the presumption in favour of rateable relief has as invariably been recognised in those cases where the new cautioner and the principal debtor have joined in the subsequent engagement, without the prior cautioner (*e*). (3.) It has likewise been held, that a cautioner joining in a bond of corroboration with one of two or more principal debtors has that relief only which is competent to his own co-obligant (*f*); but, when such co-obligant is a cautioner in the prior obligation, (in place of a co-principal,) the second cautioner has total relief against the principals (*g*). (4.) If the result in these cases be taken as conclusive, it follows that the only situation open to the effect of circumstances, is that of a cautioner granting alone a corroborative deed. In cases in this class the determination has not been uniform, but influenced by the facts of each individual case. Thus, if the subsequent engagement have been undertaken at the desire or on behalf of the principal debtor alone, then the new cautioner has only a rateable relief, as if he were a party to the original bond. If, on

the other hand, he had interposed at the request of the former cautioners, or even if the former cautioners had been apprised of the application to the new cautioner, and approved of it, as tending to relieve them from present demand, then the latter is entitled to a total relief (*h*). (5.) Among the indications which are of importance, as real evidence of the nature of the transaction, a demand of payment made against the former cautioners, prior to the engagement of the new cautioner, and the subsequent forbearance of the creditor against all the parties, have been sustained as sufficient to found a claim of total relief (*i*). Other indications considered as conclusive, are the death or absence abroad of the principal debtor, and the approaching expiry of the cautionary obligation, with the consequent registration of the bond for diligence (*k*). But it is not enough to infer interposition on behalf of a former cautioner, that the new cautioner has not taken a bond of relief from the principal debtor (*l*). (6.) A bond of caution in a suspension of an obligation wherein there is a cautioner, although regarded as a corroborative security, would seem in all cases to afford a sufficient presumption that the new engagement has been undertaken as well on behalf of the prior cautioner as of the principal debtor, if the former, in place of making payment of the debt, take advantage of the stay of diligence thus obtained (*m*). (7.) In those cases where the new cautioner has only rateable relief, the prior cautioners, as a necessary consequence, acquire a right on their part to the like relief from him, when the debt is paid by them in the first instance (*n*): the obligation must be reciprocal. But where the new cautioner undertakes only a subsidiary liability, which does not emerge until the prior cautioners have been discussed, and is thus truly contingent on their bankruptcy, he is sole cautioner for the balance which the creditor is unable to recover from them, and is consequently under no obligation of relief in any circumstances to

such prior cautioners (*o*). (8.) From these considerations the practical result so important to the conveyancer may be deduced, to trust solely to an express obligation of relief by those parties, whether principals or cautioners, or both, on whose account the new cautioner interposes his credit, and from whom, as all bearing the character of principals towards him, it will in the ordinary case be understood that he shall have full relief.

(*a*) Ersk. 3. 3. 69.

(*b*) L. Kilkerran in Mirrie, 10th July 1745, M. 2125.

(*c*) Note by Ivory, 181, Ersk. 684; 1 Bell, Com. 351. The case of Inglis, 26th June 1798, Bar. Hume, p. 87, may at first sight seem to involve an exception; but there the new cautioner would appear to have been truly bound only *subsidiarie*, and thus to have had no community of interest with the prior cautioners.

(*d*) Mirrie, as above; Mackenzie, 30th Nov. 1755, M. 14,661; Elch. *Cautioner*, 23; Walker, 30th May 1827, S. 5. 726, affd. W. S. 4. 40.

(*e*) Ker, Feb. 1685, M. 14,641; Murray, 15th Dec. 1722, M. 14,651, affd. Robertson, 465; Smiton, 15th Nov. 1792, M. 2138; Lennox, 18th May 1815, F. C. See Alison, 27th Feb. 1701, M. 14,643.

(*f*) Godfrey, 3d Dec. 1717, M. 14,650.

(*g*) Librack, 2d March 1636, M. 2118.

(*h*) Bell, as in (*c*); Loch, 18th Dec. 1701, M. 14,644; Clarkson, 1st Dec. 1703, M. 14,645.

(*i*) Clarkson, as in (*h*).

(*k*) 1 Bell, Com. 352-3.

(*l*) Lennox, 18th May 1815, F. C.

(*m*) Ersk. 3. 3. 72; Wallace, 27th Feb. 1685, M. 14,642. This was the case of a cautioner in a second suspension, which seems analogous in principle to that of the cautioner in a first suspension, with relation to a cautioner in the bond suspended; Broomhall, July 1687, M. 14,643. See to the contrary, Arnold, 23d Feb. 1671, M. 14,641.

(*n*) Ker, Lennox, as in (*e*). See Murray, as in (*e*); L. Kilkerran in Mirrie, as in (*b*).

(*o*) Inglis, as in (*c*). The obligation here seems, in effect, to have been subsidiary.

# CHAPTER II.

## DEEDS OF TRANSMISSION.

### TITLE I. THE ASSIGNATION.

30. ORIGIN AND HISTORY.—1. *Ancient and modern forms of the assignation.*—Our institutional writers throw but a faint light on the origin of our styles of deeds, and the assignation does not form an exception. But Mr Ross has in his lectures traced the assignation from our early forms, when coeval with those in use in England, and his ingenious account of this deed of transmission of our written obligations is well deserving the attention of those who are not satisfied with simply knowing the present structure and purpose of a deed, but are likewise curious as to its origin (*a*). He differs much on the subject from other writers, more particularly Lord Kames, who has some incidental observations on the assignation in commenting on the act respecting procuratories of resignation and precepts of sasine; but the truth probably lies somewhere between the opinions of these commentators. As observed by Ross, the English deed of assignment, with which the ancient Scottish form of the assignation appears to have been identical (*b*), is substantially a mere power of attorney, and not an absolute deed of transmission, the assignee transacting in the name of the cedent, and delivering up the obligation when the contents are paid, as an essential element of the discharge, so that intimation of the assignment has never become a necessary form in the law of the sister country. In effect, therefore, the English and ancient Scottish assignment was truly a procuratory in

*rem suam*, effectual for the recovery of the debt, but not taking the contents of the obligation *ex bonis* of the cedent, unless payment had been obtained during his lifetime. (2.) It is an interesting question when, and through what means, the Scottish assignment lost its merely mandatorial character, and passed into its present form of a deed of absolute transmission. This change is supposed by Ross to have taken place in the course of the 15th century, and to have been produced during our close intercourse with our ancient allies of France, who had adopted from the civil law the form of substituting another in the right and place of the creditor, by a deed called *transport;* from which he concludes that we borrowed our modern assignation, with the ceremony of intimation, and mode of attesting this form of completing the right. He thus leaves nothing to be attributed to native ingenuity, in turning a mere mandate into an absolute conveyance, although, where a right of property was undoubted, the rejection of the old fiction of a procuratory was according to the genius of our practice, which has uniformly modelled our forms on the existing law. (3.) But whether the modern assignation be a native deed, or borrowed from the French, it is by no means clear, as assumed by Ross, that it is founded upon any mode of transmission known in the civil law. For although the *cessio bonorum* was an extrajudicial as well as judicial form, *(bonis cedi non tantum in jure sed etiam extra jus potest)* (*c*), and has in all probability contributed the words *cedent and cessionary* to our modern assignation, the *cessio* related solely to the transmission of tangible property. Claims of debt *(jura incorporalia* or *nomina debitorum)* seem to have been intransmissible by direct conveyance, although communicable to a third party by means of the procuratory *in rem suam.* They were, in fact, not goods, but obligations simply, and were not therefore considered to be in any other manner transferable than by

means of a mandate or procuratory to act in their recovery in the name of the creditor. It is true that the term *assignare* or *adsignare* occurs in the civil law, and was employed in the sense of making over to a child the services of a freed man, with the right of property in his goods. This word, therefore, if directly imported into our deed, would have applied not to the debt but the debtor, although it may perhaps be not an improbable supposition, that when the assignation assumed the form of a direct conveyance, the term descriptive of a transmission of the debt was derived from the word *cessio*, whilst the word *adsignare* was borrowed to signify the power given to the assignee over the debtor in the obligation. (4.) According to the view expressed by Kames, and even Erskine, this form of deed of absolute transmission was originally connected with, and a consequence of the introduction into the style of the moveable bond of the word *assignees*, whereby the debtor consented to the obligation being transferable at the pleasure of the creditor (*d*); but this notion seems to be inconsistent with the course of practice, in which decrees and other grounds of debt were equally the subjects of assignation as bonds, a circumstance which is not observed by our writers; and indeed it would appear, that long prior to Stair's time, there remained this only test of the transmissibility of a bond by simple assignation, that it was of its own nature moveable (*e*). According to our practice for a century past, even the express seclusion of assignees is of no greater force than a substitution or simple destination, being defeasible for onerous causes (*f*).

2. *Origin of the ceremony of intimation.*—(1.) But whether we conclude, with Mr Ross, that the modern form of the assignation was adopted during our close intercourse with France, or was a result of the natural progress of the right in adjusting itself to the notion of the free transmissibility of obligations, it is manifest that the form and ceremony

of intimation were a necessary consequence of the power in the cedent of transferring both the debt and the debtor to a new creditor. So long as the assignee acted as a mere procurator or mandatary in the name of the cedent, he discharged the obligation in that character, the debtor's interest extending no farther than to see that the assignee's authority was complete, and receive delivery of the document assigned, so as to bring himself within the protection of the maxim, *Chirographum apud debitorem repertum præsumitur solutum.* Any one of several assignees, therefore, as a duly authorised mandatary, and having possession of the document of debt, was necessarily the party entitled to receive payment. (2.) But as soon as the fiction of a mandate was thrown aside, and the assignation was employed to vest the assignee with the right of the cedent, it became of importance that the debtor should have made known to him the new creditor to whom he was to be answerable, and that in such a form as to admit of legal proof; so that the debtor might be enabled to determine to what party he was in safety to make payment. In substance, therefore, as well as form, express intimation to the debtor became necessary; but it is manifest that the notion of the intimation being at first employed solely to put the debtor *in mala fide* to pay to the creditor, implies a disregard of the interests of third parties transacting with the creditor; for unless the intimation were to complete the transference, as well as to advertise the debtor of the assignation, it is plain that there could exist no possible test of the denuding of the creditor, to the end that an assignee might calculate with certainty on his right being secure. It was accordingly held, that intimation of the assignation was an essential ingredient in completing the transference, when double rights were in competition; (below, § 42). And where the law has admitted equivalents as exceptions to the strict

form of intimation, and he has received such information as to lead to the belief that the creditor has assigned the debt, the debtor is permitted to protect himself from a double claim, by placing the fund in the hands, and at the disposal of a court of law, by means of a process of multiplepoinding. (3.) As a consequence of the rule thus established, the creditor was not denuded by an assignation which remained unintimated; the right continued *in bonis* of the cedent; and therefore, upon his death, it behoved to be taken out of his *hæreditas jacens* by means of confirmation. This was altered as regards special assignations, by a statute passed in 1690 (*g*). (4.) The technical difficulty still remained, that an assignee who had not perfected his right during the cedent's lifetime, could take no judicial step in his own name, without having, in the first instance, the process *transferred* against the debtor, at his own instance. This obstacle was removed by another statute, which likewise authorised assignees to obtain decreet of registration of an original document assigned, without a formal action of registration, simply by production of the deed, with a special assignation, to the keeper of any competent register (*h*).

(*a*) Kames' Elucid. Art. 39; Ross, 1, 176. *et seq.*

(*b*) See Redfearn in House of Lords, 1st June 1813, Dow, 1. 50.

(*c*) D. 42. T. 3. § 9.

(*d*) Ersk. 3. 5. 2; Kames, as in (*a*).

(*e*) Stair, 3. 1. 16. See Mackgill, 20th June 1632, B. S. 1. 192.

(*f*) Boswell, 7th Feb. 1759, M. 12,578.

(*g*) 1690, c. 26, *Anent the confirmation of testaments. (Excerpt)*—And further their Majesties with consent foresaid, Declare that where Special Assignations and Dispositions are lawfully made by the Defunct, tho neither intimate nor made publick in his lifetime they shall be yet good and valid Rights and Titles to possess bruik, enjoy, pursue or defend, albeit the sums of money or goods therein contained be not confirmed without prejudice always to the competition of creditors and others and of their Rights and Diligences as formerly before the making hereof.

(*h*) 1693, c. 15, *For summar Registrations and discharging Transferrings* activè. OUR SOVEREIGN LORD AND LADY the King and Queens Majesties,

with advice and consent of the Estates of Parliament Statute and Declare, that all Writs registrable may be registrate after the death of the Creditor at the instance of his heir executor or assigney, as well as of before, and that upon production of a Service or Retoure in the case of Bonds or other Writs heritable, or of a confirmed Testament, containing the bond or other writ, in case they be moveable, or of ane special Assignation, tho not intimate in the case of either, Which Registration shall have the same effect, both as to Probation and summar Execution, as if the creditor were still in life, And further it is Statute, that if it shall happen the Pursuer to decease at any time during the dependence of any Process raised at his instance, there shall be no need for hereafter for his Heir Executor or Assigney to raise and obtain a Transferring *activè*; But the said Heir, Executor or Assigney is hereby allowed, upon production of his Service or retour, confirmed Testament or Special Assignation, tho not intimate, to insist in the principal cause sicklike in all respects, as the Pursuer at whose instance the process was raised might do, if he were still in life but prejudice to Transferrings *passivè*, conform to the former Practique as accords.

31. General nature.—(1.) Assignation in a broad sense means the transmission of any right of a moveable character from one party to another. Assignations are legal or voluntary. Of the former, the transference by marriage of the wife's moveable property to the husband, and the judicial acquisition of the goods of the debtor by means of arrestment and forthcoming, or by a trustee under a sequestration, are examples, and they need no intimation. The voluntary assignation is the deed now to be considered. (2.) The *assignation*, properly so called, is a deed employed for ceding or transferring, from one party to another, any right of a moveable contradistinguished from a heritable nature. Rights of the latter character not perfected by sasine, or valid without infeftment, or rights in security, although clothed with infeftment, are transmitted by a deed called *disposition and assignation*, which, as conveying heritage, contains proper dispositive words (*a*). The *ipsa corpora* of moveables, again, are conveyed by a deed called *disposition of moveables*. The creditor making the assignation is styled *cedent*, and

the party receiving it, *cessionary*, or *cessioner*, *and assignee*. A second, or any future transmission of a bond or other right, receives the name of *translation;* and a reconveyance by an assignee to his author, or a prior cedent, is called a *retrocession*.

(*a*) Duff, Feud. Conv. § 227, *et seq.*

32. CLAUSES OF THE ASSIGNATION. The ordinary clauses contained in the assignation, are, 1. The *narrative*. 2. The *subsumption*. 3. *Clause of assignation*. 4. *Powers of the assignee*. 5. *Clause of warrandice*. 6. *Clause of delivery*. 7. 8. *Registration and testing clauses*.

33. NARRATIVE (*a*).—1. *Description of the cedent*. This clause contains the name and designation of the creditor or cedent. It expresses, also, the title by which he has acquired the right, or joins in the deed, if he was not a party to the obligation assigned. Thus, a trustee, or an executor, as vested with the right, may competently transmit it to another. Thus, also, a mandatary may assign in name of his author, or a tutor in name of the pupil, the consideration received from the assignee being always properly applied to the use of his ward. A husband, likewise, must concur in an assignation by the wife, as her legal curator, and for his own interest. The forms applicable to these and other cases occurring in practice, are exemplified in the Style-book (*b*).

2. *Description of the debt or obligation assigned*.—(1.) Subjects, or rights not communicable by assignation, are exceptions to the general rule of law. Such are conjugal and parental rights, which belong to and must be exercised by a husband or father in that express character. Some rights are personal in another sense, as an office or a lease of ordinary endurance, which, as there exists a *dilectus personæ*, can be enjoyed only by the chosen indivi-

dual. A right of liferent, also, is in a certain sense incommunicable; that, as depending on the life of the person on whom it has been conferred, it necessarily terminates at his death; but the substantial interest may be given to another so long as the liferent exists. An alimentary right being strictly intended for personal maintenance and support, absolute transmission would violate the condition on which it is bestowed; but the qualified assignation of such a right has been sustained, to the effect of reimbursing a party making advances for the alimentary use of the cedent (*c*). Bonds in which there is an exclusion of assignees, although incapable of transmission for gratuitous considerations, may be conveyed for onerous causes (*d*). (2.) Subject to these exceptions, moveable rights of whatever nature are assignable at the pleasure of the creditor. Even a future or merely contingent debt may be conveyed, subject to the condition which attaches to it. Thus, a legacy or provision is assignable, although the effect of the assignation is suspended until the right shall have vested by survivance; (see *Testament*, *Marriage-Contract*); and even the right to receive payment of future annuities, although the liferent right itself is in a strict sense incommunicable (*e*). Among those rights which are transmissible by assignation is classed the *jus crediti*, or right of action competent to a party having an interest in a trust-estate, relating to heritable property vested in the trustees (*f*); but in such cases it is advisable to use dispositive words.

3. *Certain debts may be transmitted otherwise than by assignation.*—(1.) Assignation is the only competent form of direct transmission *inter vivos* of moveable rights and claims, with the exception of sums in bills and promissory-notes, bankers' receipts, and open accounts of men of business, merchants and tradespeople, which, from favour to commerce, are transferable by indorsation; although a new creditor may be indirectly vested with a

claim of debt constituted by deed, by his obtaining a renewed bond or other document from the debtor, with the original creditor's consent, and a debt on open account may likewise be transmitted by a draft on the debtor in favour of a third party accepted or presented, and protested (*g*). But a sum contained in a privileged document such as a bill, comes under the ordinary rule so soon as the voucher has ceased to be the sole evidence of the debt; and thus a claim on a debtor's sequestrated estate, although originally vouched by bill, is no longer transmissible by indorsation (*h*). The same rule is said to maintain in regard to a claim in a private trust (*i*). It is specially to be observed, that as no judicial act or decree is transmissible otherwise than by formal assignation (*k*), (a rule which, it is thought, applies equally to notarial acts,) the indorsation of a bill or note does not carry right to a protest following upon it either before or after registration, although the voucher and its contents will pass thereby, so as to warrant new proceedings at the instance of the indorsee (*l*). (2.) Bonds blank in the creditor's name were at one period common in our practice, introduced, as Stair expresses it, "to shun the trouble of "assignations, translations or intimations thereof, as they "pass from hand to hand;" and likewise, for this other reason, "to shun compensation upon any debt due by "the cedent" (*m*). The authority of Stair in regard to a form which seems to have been adopted in his own time, for he alludes to the practice as having "become of late "very frequent," must be received in preference to the unsupported opinion of our latest writer (*n*), who alludes to the blank bond as a means introduced for supplying a power not then possessed, to substitute another creditor for the original one. Such a power was possessed at a period long prior to the introduction of blank bonds. These blank writs were prohibited by a statute (*o*), which, as it mentions assignations as well as bonds, shows clearly

that the power of direct transmission was then well ascertained, and confirms Lord Stair's account of the purpose of introducing blank bonds.

(*a*) I A., CONSIDERING that B. by his bond dated acknowledged to have borrowed and received from me the principal sum of L. sterling, which sum the said B. bound and obliged himself, *(obligatory clause of bond shortly narrated.)*

(*b*) Jurid. Styles, 2. 319, *et seq.*

(*c*) Ersk. 3. 5. 2; Bell, Com. 1. 131; Urquhart, 15th Dec. 1738, M. 10,403; E. of Buchan, (or Monypenny,) 11th July 1835, F. C., S. 13. 1112; Waddell, 26th Nov. 1836, F. C., D. 15. 151.

(*d*) Boswell, 7th Feb. 1759, M. 12,578.

(*e*) See Flowerdew, 5th March 1835, F. C., S. 13. 615, and note of Lord Jeffrey, where the distinction between the effects of assignation and arrestment in reference to future debts is observed.

(*f*) Gordon's Trs. 4th Dec. 1821, F. C.; Paul, 22d May 1835, S. 13. 818, and cases cited.

(*g*) Stair, 3. 1. 12; Campbell, Thomson and Company, 26th May 1803; M. App. *Implied Assignation*, No. 2; Bell, Com. 2. 20; Note 261, (by Ivory,) Ersk. p. 720; Bell, Pr. 1465, and auth. cited.

(*h*) Wallace, Hamilton and Company, 8th June 1821, S. 1. 54; affirmed, S. 2. 467.

(*i*) Bell, Com. 2. 20.

(*k*) Ersk. 3. 2. 31.

(*l*) Bell, Com. 2. 19, and notes, 2, 3.

(*m*) Stair, 3. 1. 5.

(*n*) Bell, Pr. 1459.

(*o*) 1696, c. 25, *Anent Blank Bonds and Trusts.* Our SOVEREIGN LORD considering that the subscribing of Bonds Assignations and Dispositions and other Deeds blank in the name of the person in whose favours they are granted As ALSO that the intrusting of persons without any Declaration or Back-bond of Trust in writing from the persons intrusted are occasions of Fraud and also of many Pleas and Contentions Doth THEREFORE with advice and consent of the Estates of Parliament STATUTE and ORDAIN that for hereafter no Bonds Assignations Dispositions or other Deeds be subscribed blank in the person or persones name in whose favours they are conceived and that the foresaid person or persones be either insert before or at the subscribing or at least in presence of the same witnesses who were witnesses to the subscribing before the delivery CERTIFYING that all writs otherways subscribed and delivered blank as said is shall be declared null, And farder that no action of declarator of trust shall be sustained as to any Deed of Trust made for hereafter except upon a Declaration or Back-

bond of Trust lawfully subscribed by the person alledged to be the Trustee and against whom or his heirs or assigneys the Declarator shall be intented or unless the same be referred to the oath of party *simpliciter* DECLARING that this act shall not extend to the indorsation of Bills of Exchange or the notes of any Trading Company.

34. SUBSUMPTION (*a*).—This clause mentions the consideration granted for the assignation, which may be either expressed, or referred to in general terms such as a *certain sum of money.*

(*a*) AND NOW SEEING that D. has made payment to me of the foressaid principal sum of L. sterling, and interest due thereon from the term of last, amounting in whole at that date to the sum of L. of which sum I hereby grant the receipt, renouncing all exceptions to the contrary.

35. CLAUSE OF ASSIGNATION.—1. *Form.*—(1.) The oldest style of the assignation is that contained in Dallas of St Martin's collection, begun in 1666, from which, and the form given in the Juridical Styles, the clause under consideration is exemplified below (*a*). It is manifest that, in the present state of the law respecting the transference of moveable rights, the greater part of either form is wholly superfluous. The terms, *cessioner and assignee*, (above, § 30,) were remotely or immediately derived from the civil law: according to Ross, they came to us directly from the French. They import an absolute right in the party in whose favour the conveyance is made, which necessarily carries all lesser rights as accessories. At the period when Dallas compiled his Collection of Styles, the assignation had thus taken its present form of a deed of absolute transmission. It appears, indeed, to have done so prior to Balfour's time; for he describes the intimation as made in name of the assignee as in right of the debt (*b*). Still Mr Ross comments on the difference between the indirect terms of transmission employed in the assignation, constituting the party *cessioner and assignee*, and the form of the translation, whereby the cedent directly *as-*

*signs* and *transfers* the obligation, as if the two sets of terms had a distinct meaning (*c*); but it is plainly a mistake to say that the assignee under the former is "made "by a deed in the style and language of a procurator "and attorney," whereas the cedent in the latter "speaks "in the language of a full proprietor;" for whatever may have been the cause of the difference in the two forms, the words in either import an absolute conveyance. In place of the ingenious, but apparently far-fetched explanation given by Ross, it will perhaps appear to some who compare the two styles, as it humbly does to the author, that the verbs *assign* and *transfer* were introduced into the translation in order to avoid the awkward repetition of the noun *assignee*, employed immediately before to designate the cedent in the translation, who is the assignee in the former conveyance, and not, as supposed to bear a different and more potential meaning than the terms *cessioner and assignee*. This supposition is greatly strengthened by another passage in the same author (*d*). (2.) The terms essential to the effectual transference of a moveable right are by no means well ascertained; for, as above observed, it is manifestly indifferent whether the assignee be *made, constituted and appointed lawful cessioner and assignee*, or the conveyance be made in direct terms, such as *assign, dispone, convey and make over* (*e*). It is affirmed indeed by Stair, that any terms which may express the "transmission of the right assigned from the cedent to "the assignee will be sufficient, as if the cedent assign, "transfer and dispone, make over, set over, gift or "grant the thing assigned to the assignee, or nominate "or constitute him his cessioner, assignee, donator or "procurator to his own behoof," whence it may be inferred that any words, clearly expressive of intention to transfer both the sum and the obligation, would be effectual to enable the assignee to vest the right in himself by due in-

timation to the debtor (*f*). But as it is never wholly indifferent what terms are used in a legal document, it is recommended that the word *assign*, or *assignee*, should uniformly be employed, as being clearly indicative of the nature of the transaction. (3.) It follows, that terms expressive merely of authority to receive payment from the debtor, or transact with him for a new obligation, and which do not therefore extend beyond the effect of a simple mandate, draft or indorsation, are ineffectual to transfer any right to a bond which has not been paid or transacted under such authority prior to the death of the creditor (*g*). (4.) The words, *surrogating and substituting* the said D. and his foresaids *in my full right and place in the premises*, are terms derived from the civil law, importing delegation, and as connected with terms which convey absolutely to the assignee all right in the cedent, are now plainly superfluous.

2. *General effect.*—The assignation gives the assignee a *jus ad rem*, which may, by means of due intimation, be made a *jus in re*, a complete and valid right to the debt or obligation assigned. When thus completed, the assignee is put in the room and place of the cedent, as at the date of the assignation. But the assignee may use all the active powers belonging to that character without formal intimation: their exercise indeed generally supplies intimation. (See *Intimation of Assignation.*)

3. *Rights acquired by the assignee.*—(1.) The assignation carries not only the debt or claim, but all diligence following thereon, although not expressed. Steps of diligence are accessory to the right, and an accessory follows the principal. Thus, an inhibition (*h*), an arrestment (*i*), a bond of corroboration (*k*), and a bond of caution for payment to the charger in a suspension (*l*), pass to the assignee alongst with the debt. (2.) Even the special conveyance of a debt heritably secured has been held

to carry an adjudication following upon the debt (*m*), an effect which seems necessarily to flow from the rule that a feudal right in security is extinguished by a simple discharge; for as the creditor may discharge, so may his mandatary, and the right of an assignee includes a mandate. But a contrary determination took place in a prior instance, where the question arose with a future adjudger of the feudal right (*n*). These cases, however, seem capable of being reconciled. In the former, the assignee had obtained charter and sasine upon the adjudication, and was thus vested both with a feudal title to the security and a personal right to the debt. In the latter, nothing appears to have followed on the assignation. It may hence perhaps be concluded, that although an assignation of a bond or debt will carry with it an heritable security as merely accessory to the obligation, so as to enable the assignee, without farther steps, validly to extinguish both the debt and security by discharge; yet where the claim is to be kept up, unless the assignee complete not merely a right to the *debt*, by intimation, but a title to the *security*, by a registered sasine, that he will not exclude a future assignee or adjudger who first obtains a completed transference to both. Any other rule would seriously affect the interests of parties transacting with creditors holding rights in security completed by infeftment, and accordingly it is held in practice, that even formal conveyances to such rights, by disposition and assignation, describing the subjects, are no more than mandates to recover and discharge, until they have been perfected in the person of the assignees by registered sasines. (3.) A clause of assignation to writs and evidents does not necessarily convey the rights to which they relate (*o*).

4. *Powers of the assignee.*—(1.) As a consequence of the right acquired by the assignee, he may sue for and discharge the debt, and use diligence in his own name;

but as the duty of a messenger-at-arms, or other officer of the law, is ministerial only, and the assignee must obtain judicial authority for using diligence at his own instance, he cannot follow up by arrestment or poinding a charge given to the debtor by the cedent (*p*). But he may obtain a special warrant for charging and arresting in his own name, by producing the decree or extract and assignation in the Bill-Chamber (*q*); and as warrant for the imprisonment of the debtor uniformly proceeds on a new application, the assignee may use for this purpose the charge given by the cedent (*r*). (2.) It was in an early case held that the assignee may sue in the cedent's name in the face of his disclamation (*s*); and although it is not probable that this result would now take place, because the completed assignation denudes the cedent, it is not unusual to stipulate, by express words, that action or diligence in his name shall be excluded.

5. *Assignation in security.*—(1.) The assignee under a conveyance in security of special claims may retain the debtor's funds in satisfaction not only of those claims, but of others incurred on the faith of the assignation; but an arrestment at the instance of another creditor stops its operation as a fund of credit to the debtor (*t*). (2.) An assignee in security is not obliged to do diligence for recovery of the debts assigned, which therefore, if they should fall by prescription or otherwise, are lost to the cedent (*u*).

6. *Assignation in trust.*—(1.) A conveyance in trust does not divest the cedent, whose right is only encumbered by the title of the trustee; and it would appear that retrocession is not essential to reinvest the cedent after the purposes of the trust are fulfilled (*v*). When the trust is for behoof of the cedent, arrestment in the hands of the assignee will interpel him from making farther payments to or for behoof of the cedent (*w*). (2.) Assignation in trust is chiefly employed for vesting several claims in a

trustee, for the purpose of his leading a joint adjudication of the debtor's property. The purpose of the trust being thus limited, the trustee is bound to denude on its being completed.

7. *Qualified assignation.*—(1.) An assignation may be qualified by a power to revoke, so that intimation will not have the effect of making the conveyance absolute (*x*). (2.) It may be qualified by an express exclusion of assignees, which renders the right intransmissible unless for an onerous cause. (3.) It may be qualified by a clause of return in favour of the cedent, which prevents the right from passing to the executors of the assignee, and (when the assignation is gratuitous) excludes the power of farther transmission, unless for onerous causes (*y*).

(*a*) (*Clause from Dallas's form.*) THEREFORE wit ye me to have made, constitute and ordained, and by thir presents make, constitute and ordain the said W. G., his heirs and assigneys, my very lawful, undoubted and irrevokable cessioners and assignes in and to the said sum of as principal, of expenses, and annuals of the said principal sum of all years and terms bygone, resting owing unpaid, and yearely and termly in time coming during the not payment thereof, (the terms of payment of the same being first come and bygone,) and in and to the foresaid Bond Decreet interponed thereto, and Letters of Horning, Poinding, Caption, Inhibition, Arrestment, and others following thereupon, Executions, Indorsations and Registrations thereof, and all Action, Pursuit, Instance and Execution whatsoever, competent, or that may be competent to me thereupon, with all that has followed or may follow on the same: AND I have surrogat, and by thir presents surrogat and substitute the said W. G., and his foresaids, in my full right, vice and place of the premises by thir presents for now and ever.

(*Modern clause from Juridical Styles.*) THEREFORE I have made and constituted, as I hereby make, constitute and appoint the said D., his heirs and donators, my lawful cessioners and assignees, not only in and to the foresaid principal sum of L. sterling, with the said sum of L. of liquidated penalty, and whole bygone interest due thereon since the term of last, (all interest due preceding that term having been paid,) and in time coming during the not payment; but also in and to the said bond itself, whole tenor and contents thereof, with all that has followed or

is competent to follow thereupon, surrogating and substituting the said D., and his foresaids, in my full right and place of the premises.

(*b*) Balfour, *Assignation*, c. 5.

(*c*) Ross, 1. 206.

(*d*) Ross, 1. 232.

(*e*) Jurid. Styles, 2. 317.

(*f*) Stair, 3. 1. 4.

(*g*) Farquhar, 11th June 1715, M. 16,467. (The clause was in these terms:) I desire you may transact the inclosed bond to the bearer, Mr James Hunter, in his own name, for he has given me his receipt and obligation to pay to me the annualrent and the principal when I seek it, after ye have paid him.

(*h*) Stair, 3. 1. 17. But the report of the case relied on mentions an *improbation*.

(*i*) 21st Nov. 1622, B. S. 1. 128.

(*k*) Stair, as in (*h*).

(*l*) Lyell, 11th March 1823, S. 2. 288.

(*m*) Wilson, 28th Feb. 1751, M. 40, 41.

(*n*) Anstruther, 27th July 1626, M. 829.

(*o*) Grahame, 15th Dec. 1814, F. C.

(*p*) Ersk. 3. 5. 8; Bell, Com. 2. 19; Stewart, 1st June 1745, M 834, 3689, Elch. *Assignation*, 6; Foggo, 7th Dec. 1769, M. 3693. See Kyle, 12th June 1813, F. C.

(*q*) 1 and 2 Vict. c. 114, § 7.

(*r*) Young, 24th Jan. 1799, M. 8137; Meek, 21st Dec. 1832, S. 11. 234. In this instance the creditor had used caption as well as horning; 1 and 2 Vict. c. 114, § 7.

(*s*) Grier, 20th Nov. 1621, M. 828.

(*t*) Clyne, 27th June 1833, F. C , S. 11. 791.

(*u*) Smith, 28th Dec. 1709, M. 3483.

(*v*) Barry, 14th Nov. 1829, S. 8. 53.

(*w*) Bank of Scotland, 7th July 1826, S. 4. 808.

(*x*) See Crockat, 12th and 22d Jan. 1743, Elch. *Assignation*, 5.

(*y*) Johnston, 24th June 1824, F. C., S. 3. 163.

36. POWERS OF THE ASSIGNEE (*a*).—This clause is superfluous: The rights and powers by law competent to the assignee are inherent in the title acquired by him (*b*).

(*a*) WITH FULL POWER to them to ask, crave and uplift the sums of money, principal, interest and penalty hereby assigned, and upon payment

to grant discharges or conveyances thereof either in whole or in part, and generally to do every other thing concerning the premises, that I might have done myself before granting hereof.

(*b*) Stair.

37. CLAUSE OF WARRANDICE (*a*).—(1.) Warrandice from fact and deed only is the customary obligation by the cedent, although of a lower degree than that implied in the transaction, which is that the bond or debt is justly due; and for any use therefore that the clause is of to the assignee, when an adequate consideration is advanced, it may safely be omitted (*b*). Absolute warrandice, even, is not stronger than that implied in the nature of the transaction, although the clause bear that the debt shall be *good, valid and effectual,* for the cedent is not understood thereby to warrant *debitorem locupletem esse,* that the debtor is solvent, which is a matter extrinsic of the obligation, but simply *debitorem esse,* that the obligant is truly debtor (*c*). An assignee, therefore, advancing an adequate consideration, ought to demand warrandice against insolvency (*d*). (2.) But if the transaction be one of hazard, the assignee taking the risk both of the debt and the debtor for a consideration under the nominal amount of the claim, warrandice from fact and deed is the proper form of the clause; and when the expressed warrandice is from fact and deed only, the assignee has no recourse on the cedent on account of the nullity of the debt (*e*). Still as the terms of this obligation embrace facts and deeds both *done and to be done,* the cedent will incur liability when the assignation is of a game debt, (annulled under the statute of Queen Anne,) by the illegal nature of the act, participated in by the cedent, through which the claim is made; (below, § 41).

(*a*) WHICH ASSIGNATION above written I bind and oblige myself and my foresaids to warrant to the said D. and his foresaids from all facts and deeds done or to be done by me in prejudice hereof.

(*b*) Ersk. 2. 3. 25-27; Bell, Pr. 1469.

(*c*) Stair, 2. 3. 46; Ersk.; Bell, Pr. as in (*b*); D. 18. T. 4. *De hæreditate vel actione vendita.*

(*d*) (*Clause.*)—AND FURTHER, I hereby warrant to the said D. and his foresaids, not only that the said B. is solvent at this date, but also the solvency of the said debtor, his heirs and successors, at whatever time payment may be demanded from him or them; and whatever loss or expense may be sustained through his or their insolvency, I bind and oblige myself and my foresaids to make good and repay to the said D. and his foresaids, including therein the necessary expense to be incurred in making the said bond effectual, as the same shall be legally ascertained.

(*e*) Ersk. 2. 3. 27.

38. CLAUSE OF DELIVERY (*a*).—This, although a usual clause, is plainly of no importance to the assignee, as it cannot supply the absence of the document of debt. The clause serves only as evidence in favour of the cedent that he has delivered the obligation to the assignee. But the possession of the obligation assigned is by no means essential to the transference of the right, as is that of the *ipsa corpora* of moveables, whereof the ownership is presumed from the possession; yet it tends to the safety of the assignee in preventing a future assignation to his prejudice, which, if first intimated, would exclude his right. And it is customary, in the formal intimation by a notary and witnesses, to exhibit the principal obligation, or an extract of it from the Register; although this is not essential (*b*).

(*a*) AND I have herewith delivered up to the said D. the foresaid bond, to be used by him and his foresaids as their own proper writ and evident in all time coming.

(*b*) Ross, 1. 201; Jurid. Styles, 2. 351.

39. CLAUSE OF REGISTRATION.—Registration is competent in all the ordinary registers; (above, § 15).

40. TESTING CLAUSE.—This clause is in common form; and the deed must be executed with the statutory formalities. (See the Feudal Conveyancing, 1. *et seq.*)

41. OBJECTIONS COMPETENT AGAINST THE ASSIGNEE.—(1.) With respect to the *exceptio ex capite doli mali*, the rule, as laid down by Stair, is, that "in personal rights the "fraud of authors is relevant against singular successors, "though not partaking nor conscious of the fraud when they "purchased; because assignees are but procurators, albeit "*in rem suam*; and therefore they are in the same case with "their cedents, except that their cedent's oaths after they "were denuded cannot prejudge their assignees." To the same effect are the opinions of Bankton and Erskine (*a*); and as respects fraud there appears to be no recent opposing authority. The rule, indeed, seems to result as a necessary consequence from the consideration that the cedent can transfer no greater right than he himself enjoys, and that the claim as a debt is equally annulled by fraud as by any other exception valid in law. Nor are these reasons affected by the contrary rule in feudal rights; for in the latter the *bona fide* disponee is not protected by the common law, but derives his immunity from express statute (*b*). The privileged mode of proof (fraud being probable *prout de jure*) arises from the latent character of the exception (*c*). (2.) The objection, that the obligation was granted for a game debt, is competent by statute (*d*); but the assignee, if not *in mala fide*, has recourse against the cedent under the warrandice of the conveyance, provided such warrandice amount to an undertaking that the debt is due; for the cedent, whose claim against the debtor is excluded by statute, might render his unlawful winnings available against another party, were he permitted to plead the original nullity of the transaction against a *bona fide* assignee (*e*). On the other hand, if the warrandice be from fact and deed only, the transaction seems to fall within the rule, that express warrandice excludes what is merely implied (*f*); and consequently the nullity of the debt would not affect the cedent, unless it were held that the

terms, "done or to be done," in the obligation of warrandice from fact and deed, embrace the original illegal act by which the pretended debt was nominally constituted. This seems, indeed, to have been the view taken by the Court in a case above referred to (*g*); for the opinion attributed to the Judges, that the expressed warrandice, which was from fact and deed only, did not supersede that implied in the nature of the transaction, *debitum subesse*, is hardly reconcileable with the doctrine laid down by Erskine in the passage above referred to, on the authority of an express decision (*h*). (3.) An assignee is likewise exposed to all objections competent against the claim as a debt; and these, prior to intimation, may be established by the writ or oath of the cedent, but after the cedent has by that form been denuded, by writ only, unless the matter has by the debtor been made litigious prior to the intimation, by means of a depending process (*i*). Even after intimation, a party not an onerous assignee, or who has given an inadequate consideration for the conveyance, (although not, as it would appear, an onerous purchaser from such assignee,) (*k*), is exposed to either mode of proof, (by writ or oath,) for establishing that the right is wholly or partly gratuitous; and if such be proved, the debtor may then resort as against the cedent, for whom the assignee is thus in effect a trustee, to the modes of proof above stated, in as far as the assignation is not onerous (*l*). (4.) But it is now established that exceptions, other than mere defences against the debt inherent in the nature of the right, or founded on compensation, (*e. g.* a collateral obligation, latent trust, or other secret or latent equity,) are not pleadable against an onerous assignee (*m*).

(*a*) Stair, 4. 40. 21; Bankton, 1. 259. § 65; Ersk. 3. 5. 10, on the authority of Stair and the case of Irvine, 6th March 1755, M. 1715. Macdonells, 10th Nov. 1772, M. 4974.

(*b*) Stair and Ersk. as in (*a*); 1621, c. 18.

(c) See M'Donell, as in (a), where the proof seems to have been unrestricted.

(d) 9 Anne, c. 14. § 1; White's Trs. v. Johnstone's Trs. 22d Jan. 1819, reported in foot note, S. 5. 40, from Notes of Lord J. C. Boyle.

(e) White's Tr. 16th May 1828, F. C., S. 6. 818, and cases cited.

(f) Ersk. 2. 3. 27; Craig, Jan. 1732, M. 16,623.

(g) White's Tr. as in (e).

(h) Ersk. as in (f).

(i) Stair, 1. 10. 16, 3. 1. 18; Ersk. 3. 5. 10; Fac. of Advocates, 25th July 1718, M. 866.

(k) See Aitchison's Assignees, 15th July 1737, Elch. *Assignation*, 3, and notes, *Adjudication*, 10; note by Ivory, Ersk. 726.

(l) Ersk. 3. 5. 10.

(m) Bell, Com. 1. 284. *et seq.*; note by Ivory, 278, Ersk. 726; Redfearn, as reversed, 1st June 1813, Dow, 1. 50. See Shaw, 2. 678, for observations on the Bench on this case. There was a latent trust constituted in this manner. Stewart held a share in a joint stock glass company, in his own name, but alleged to be in trust for another mercantile company of which he was a partner. The trust had not been intimated to the glass company. Redfearn advanced money to and obtained an assignation from Stewart as an individual, but the Court gave effect to the latent trust. The House of Lords, however, (under the direction of Lord Chancellor Eldon and Lord Redesdale,) held, under the nature of an assignation, which requires intimation to complete the transference in questions with third parties, that the party holding an intimated assignation was preferable to the mercantile company claiming in virtue of a mere secret or latent equity.—See Stair, 1. 10. 16; Ersk. 3. 5. 10; Hamilton, 16th Jan. 1627, B. S. 1. 230; Hamilton, 13th July 1629, M. 830.

42. INTIMATION.—1. *Form.*—The transmission of rights by assignation is completed by intimation of the assignation. Intimation is required not merely to put the debtor *in mala fide* to pay to the cedent, but as a ceremony essential to denude the cedent of the right (a). (1.) Intimation is in practice made by the assignee; but it is no good objection that it was given by the cedent, although the form in use is not adapted to this case (b). (2.) According to the regular form, the assignee or his procurator, who is sufficiently authorised by having possession of the assignation, although at an early period a procuratory appears to have been made out in a separate form (c),

proceeds to the personal presence of the debtor, with a notary-public and two male witnesses of the age of fourteen or upwards. The procurator for the assignee (*d*) delivers to the debtor a copy of the assignation, (but not necessarily of the document assigned, which is only required to be exhibited and produced,) with a schedule subscribed on each page by the procurator and notary, expressing what is done, and puts a piece of money, usually of silver, into the hand of the notary, saying, I take instruments upon this intimation in your hands before these witnesses. This ceremony is then embodied in an instrument or certificate called *Instrument of Intimation* (*e*). Practice has not sanctioned the form mentioned by Balfour, on the authority of a decided case, of merely reading the assignation to the debtor in presence of the notary and witnesses (*f*). (3.) It has been held that the same person cannot act both as procurator and notary (*g*). (4.) In the debtor's absence, intimation is in practice made at his dwelling-place, as is necessary in executions of summonses, and intimation at a merchant's shop has been rejected (*h*). When he is abroad, it must be given at the record-office of edictal citations, in the General Register-House at Edinburgh, by authority of letters of supplement passing under the signet (*i*). The service in virtue of this judicial warrant is made by a messenger-at-arms, who subscribes the execution together with the notary and witnesses, who are witnesses both to the service and intimation (*k*). (5.) Intimation to one of several co-obligants, whether principals or cautioners, is said to be sufficient for completing the conveyance, although it cannot put the others *in mala fide* to pay to the cedent (*l*). But the report of the decision relied on by Stair supports only the latter conclusion. It is plainly, therefore, the duty of the conveyancer to intimate to all the co-obligants, and thus leave no room for question. (6.) Intimation to an incorporation may competently be made to the treasurer, as the member specially charged

with its funds (*m*); and intimation made to two clerks of a trading company, who were likewise its managers, a minute of the intimation having been entered in the company's books, has been sustained (*n*). (7.) It has been maintained, that intimation made to the confidential law agent of a party who is out of the kingdom is valid; but the case in which the question occurred was decided on another ground (*o*). (8.) Intimation to a factor was not sustained, although an entry had been made in his books; but the decision was reversed on appeal (*p*).

2. *Equivalents.*—Intimation under form of instrument, as it is styled, although the mode which every prudent conveyancer will adopt, in order to exclude all risk of challenge or competition, is not however essential. (1.) It is enough that the fact of intimation having been made can be established by valid evidence in writing. Thus, the unattested acknowledgment of intimation, written by the debtor on the assignation, has been sustained (*q*); and his subscription as a party (although not as an instrumentary witness) to the deed of conveyance, or a corroborative deed (*r*), is sufficient, because knowledge of the contents of the deed is presumed against the former, but not against the latter; but the same effect is not given to the debtor's subscribing a deed containing merely a narrative mentioning the assignation (*s*). Among equivalents is also classed the citation of the debtor in an action, as evidenced by a formal execution (*t*), which Stair and Erskine extend to the execution of horning, (now superseded by a charge on the decreet or registered obligation,) or of any diligence, even arrestment, used against him by the debtor (*u*); but Mr Bell mentions horning only (*v*), and that as if it were matter of doubt, for which there seems to be no good ground. A holograph promise by the debtor to pay to the assignee (*w*), for a promise to pay can only be proved *scripto* (*x*), has likewise been sustained. Erskine, it is true, affirms that a verbal promise upon a communing is effectual; but

the authority of the case relied on has, on this point, been questioned (*y*); and effect has been given even to an entry by the debtor or his factor in an account book (*z*). (2.) The production of the assignation in a process of multiplepoinding, to which both the debtor and competing creditor were parties, has been held equivalent to intimation, on the obvious ground, that all parties interested are thus in the knowledge of the transaction (*aa*); but even as against the debtor, the judicial production of an assignation is not sufficient to interpel him from paying to the cedent, unless such production be made, and the deed thus brought under his notice, with reference to the particular claim (*bb*). (3.) Payment of interest by the debtor to the assignee plainly establishes the relation of debtor and creditor between them, and therefore, if duly established, operates as equivalent to intimation (*cc*). (4.) The point, as to the effect of the debtor's private knowledge of the assignation, is by no means clear. Stair affirms that such knowledge does not supply intimation—an opinion concurred in by Erskine, excepting as regards the debtor himself (*dd*), but it has been questioned whether this exception be well founded (*ee*). Mr Bell, in his more recent work, recognises, however, the distinction drawn by Erskine, that although mere private knowledge is not equivalent to intimation, it is, if legitimately proved, a sufficient bar to the debtor's paying to the cedent—a distinction which seems to be consistent with the relative situations of the parties (*ff*). Private knowledge is not enough for deciding a competition; but it ought to put the debtor *in mala fide* to place the fund out of the reach of the competitors, by paying it away to the cedent. The only question, indeed, seems to be that of evidence; for it is admitted by Stair that private knowledge may exclude *bona fides*, if such knowledge be certain (*gg*). Private knowledge is opposed to formal intimation, written acknowledgment or promise, and, it would appear, may

competently be established by the debtor's oath (*hh*); although such probation would not, perhaps, be competent in a question as to formal intimation between competing creditors (*ii*). (5.) It follows, that an unanswered letter from the assignee to the debtor, which amounts only to private knowledge, is not equivalent to intimation, as in a competition (*kk*). (6.) Nor is an assignation effectually intimated by registration, or by the registration of an inhibition used upon it against the cedent (*ll*).

3. *Effect.*—Intimation, or something which the law sustains as an equivalent, is essential for completing the conveyance; for, although an assignation unintimated is valid in questions with the cedent or his representatives (*mm*), this depends upon the principle, that a party cannot question his own deed. (1.) *As respects the debtor:* So long as he continues in ignorance of the assignation, payment by the debtor to the cedent is good payment, and any composition or transaction between them is valid to the debtor (*nn*). It is true that the creditor, by accepting payment from the debtor, subjects himself to liability under his warrandice to the assignee; but as intimation is necessary to divest him of the right, the creditor has still the legal title to receive and discharge. (2.) *As respects competing parties:* Since the debtor may thus settle with the creditor, so may he pay to, or transact with any having the creditor's authority, so long as he is not denuded and the debt and debtor transferred to the assignee by intimation; and thus a second, or other future assignee, who first intimates his conveyance, may exclude the prior assignees by obtaining payment; and, even in competition, his right will be preferred if the assignation be not merely gratuitous (*oo*). It follows that, before intimation, there is no concourse of debit and credit between the debtor and assignee, and that compensation is therefore not pleadable by the latter (*pp*). And as a judicial has the like effect as a voluntary assignation, arrestment ex-

cludes a prior assignation which remains unintimated,—a result which is likewise produced by the confirmation by an executor-creditor of the deceased of the debt assigned, prior to intimation of the assignation; for the statute which renders special assignations valid titles on which to sue and defend, without the necessity of confirmation, protects the rights of competing creditors (*qq*); but the confirmation of an executor-nominate of the cedent, although acting as a trustee for his creditors, (which is not a step of diligence,) does not divest the cedent and thus exclude the unintimated assignation (*rr*); nor does the legal assignation of marriage, although effectual without intimation, exclude a prior assignation by the wife, since the husband is liable in the warrandice of this conveyance (*ss*). As a cedent, who reserves power to revoke the assignation, remains thus vested with the substantial right, intimation of the qualified conveyance cannot complete the right; and a party, therefore, who intimates an absolute assignation, prior to intimation by a former assignee of a renunciation by the cedent of the power to revoke, or an arresting creditor of the cedent, will acquire a preference (*tt*). (3.) Intimation being competent by the cedent, such intimation, as conclusive evidence of his purpose to transfer the right to the assignee, is held to supply delivery of the deed of assignation (*uu*).

4. *Intimation unnecessary.*—Judicial assignation by arrestment or sequestration, or legal by marriage, needs no intimation (*vv*); nor does an assignation by a trustee for creditors whose own right is duly perfected require intimation by a creditor to whom the claim is conveyed in satisfaction of debt (*ww*).

(*a*) Stair, 3. 1. 6; Ersk. 3. 5. 3.

(*b*) Balfour, *Assignation*, c. 6; M'Lurg, 24th Feb. 1680, M. 845; B. S. 3. 343.

(*c*) See Bruce, 24th Jan. 1577, M. 845.

(*d*) Ross, (1. 198.) points out an error into which Lord Kames had

fallen, (Elucid. 319,) in assuming that the intimation must be in the *cedent's* name. The intimation was in name of the *assignee*, as having a direct right, as far back as Balfour's time. See Balfour, *Assignation*, c. 3, 5.

(*e*) Jurid. Styles, 2. 351-2.

(*f*) Balfour, as in (*d*).

(*g*) Scot, 3d July 1628, M. 846.

(*h*) Cleland, 29th Jan. 1686, B. S. 3. 579. But the judgment seems to have been that of the Lord Ordinary only.

(*i*) Castles, 12th March 1684, B. S. 3. 507; 6 Geo. IV. c. 120, § 51, and A. S. 11th July 1828, altered by 1 and 2 Vict. c. 118, and A. S. 24th Dec. 1838.

(*k*) Jurid. Styles, 3. 280. The form of the supplement here exemplified mentions in the will the record office of the *keeper of the records*. It is now the keeper of the record of *edictal citations*.

(*l*) Stair, 3. 1. 10, on authority of Lyon, 23d Feb. 1610, M. 1786; Ersk. 3. 5. 5. See Mossman, Feb. 1670, B. S. 2. 457.

(*m*) Keir, 10th Jan. 1739, M. 738, 850.

(*n*) Watson, 19th Nov. 1755, M. 738, 850.

(*o*) Dougal, 17th Nov. 1795, M. 851; Bell, 41. It is observed by Mr Bell, (Com. 2. 17,) in reference to this case, that the matter of intimation to a party forth of the kingdom now stands on the footing of the act 6 Geo. IV. c. 120, § 51. But it would seem that this statute merely introduces a new form of intimation to persons out of Scotland, which was formerly made at the market-cross of Edinburgh, and pier and shore of Leith, and does not prescribe intimation to the debtor himself as a necessary solemnity.

(*p*) E. of Aberdeen, 30th July 1729, M. 867, as reversed, 9th April 1730, Cr. and St. p. 44.

(*q*) Newton, 23d Nov. 1785, M. 850.

(*r*) Mackalzean, June 1586, M. 854; Cred. of Ballenden, 28th March 1707, M. 865; Turnbull, 12th June 1751, M. 868.

(*s*) Johnstone, March 1682, M. 864.

(*t*) White, 22d March 1622, M. 854; L. Elphingston, 21st Jan. 1624, M. 858; Ogilvie, Dec. 1681, M. 863.

(*u*) Stair, 3. 1. 7; Ersk. 3. 5. 4.

(*v*) Bell, Com. 2. 18, note 1.

(*w*) M'Gill, 22d Jan. 1630, M. 860; E. of Selkirk, (or Gray,) 22d July 1708, M. 4453, as reversed, Robertson, No. 1.

(*x*) Home, 11th Dec. 1674, M. 863; Dickson, 18th Jan. 1766, M. 873; Hailes, 675.

(*y*) Fac. of Advocates, 25th July 1718, M. 866; Bell, Com. 2. 18; Notes by Ivory, 263, 264, Ersk. 721; but see L. Dunipace, 31st March 1624, M. 859, where the communing was allowed to be established by the

debtor's oath. But here there does not appear to have been a competition of rights.

(*z*) E. of Aberdeen, as in (*p*).

(*aa*) Dougal, as in (*o*).

(*bb*) Murray, Nov. 1622, M. 855.

(*cc*) Livingston, 16th Nov. 1626, M. 860.

(*dd*) Stair, 3. 1. 7; Ersk. 3. 5. 5.

(*ee*) See note 264 by Ivory, Ersk. 721; Bell, Com. 2. 18, on authority of Dickson, 18th Jan. 1776, M. 873; Pr. of Equity, 1. 59; Bankton, 3. 1. 12.

(*ff*) Bell, Pr. 1465. See L. Dunipace, 31st March 1624, M. 859.

(*gg*) Stair, 2. 1. 24.

(*hh*) L. Dunipace, as in (*ff*). *Quære*, Would private knowledge be inferred against a husband by a regular instrument of intimation, as made to his wife as the original debtor in the obligation? See Ross, 20th Dec. 1682, B. S. 2. 28.

(*ii*) Bell, Com. 2. 17. note 10.

(*kk*) Bayne, 21st Nov. 1679, M. 863.

(*ll*) Ersk. 3. 5. 6.

(*mm*) Stair, 3. 1. 15; Ersk. 3. 5. 3; Thome, Dec. 1683, B. S. 2. 49.

(*nn*) Balfour, *Assignation*, c. 3, 4.

(*oo*) Stair, 3. 1. 6; Ersk. 3. 5. 3; Rollo, 4th Feb. 1665, B. S. 1. 510.

(*pp*) Ersk. 3. 5. 3.

(*qq*) 1690, c. 26, above, p. 68; Ersk. 3. 5. 3, on authority of Sinclair, 5th July 1726, M. 2793, which overrules the case of Ridpeth, M. 2792, cited by Stair at 3. 1. 15.

(*rr*) Grant, 5th Feb. 1828, S. 6. 489.

(*ss*) Ersk. 3. 5. 7.

(*tt*) Crockat, 12th and 22d Jan. 1743, Elch. *Assignation*, 5.

(*uu*) M'Lurg, 24th Feb. 1680, M. 845; B. S. 3. 343. Fountainhall disapproves of this decision, as seeming to lay down a ground for permitting debtors to gratify one creditor before another, and so of defrauding of the rest; but Mr Bell relies on it as sound, (Pr. 1461.)

(*vv*) Stair, 3. 1. 13, 14.

(*ww*) Stirling *v.* Smith, 5th Dec. 1712, M. 845.

43. Practical conclusions.—The following particulars seem worthy of the attention of the conveyancer. (1.) In transacting an assignation, warrandice ought to be required, not merely from fact and deed, or even absolutely against all deadly; but also of the solvency of the debtor to

the extent of the sum advanced as the consideration of the conveyance. (2.) Delivery ought to be obtained of the bond or other deed assigned. (3.) Formal intimation should be made of the assignation without any delay, even when it is intended to proceed with action or diligence, or obtain a corroborative deed, provided intimation be practicable sooner than a citation or charge can be given; not trusting to any one or more of the equivalents mentioned above, which, in a work of this description, are alluded to more for the purpose of showing how little they ought to be relied on by the conveyancer, than as properly falling within its scope. (4.) The author would recommend a more simple style of the assignation, suited to the present state of the law; and he ventures to exemplify a form of this description in the notes (*a*).

(*a*) I, A., CONSIDERING that B., by his bond, dated *(obligation in bond shortly narrated.)* AND NOW SEEING that C. has made payment to me of the foresaid principal sum and whole interest due thereon: THEREFORE I hereby ASSIGN to the said C., his heirs, executors and assignees, the said bond, with the sums of money therein contained, *(if partial payments, or payments of interest have been made, the conveyance will of course be qualified,)* WHICH ASSIGNATION I bind myself and my foresaids to warrant from fact and deed, only *(or absolutely, or against insolvency, as may be agreed on.)* AND I have herewith delivered up the said bond to the said C. *(add usual clause of registration and testing clause).*

## TITLE II. TRANSLATION (*a*).

44. FORM AND EFFECT.—The term translation is applied to a second, or any subsequent assignation of a debt. A slight difference between the style of the assignation and transference is noticed above, (§ 35); but the effect of the two deeds is the same.

(*a*) Jurid. Styles, 2. 354. See abridged form of assignation, § 43, note (*a*).

## TITLE III. RETROCESSION (*a*).

45. FORM AND EFFECT.—The style of the retrocession, the deed employed to reconvey to a cedent the right assigned, is exemplified in the notes. The effect when duly intimated to the debtor is to re-invest the cedent; but if the assignation has remained unintimated, it is extinguished by a retrocession without intimation.

(*a*) Jurid. Styles, 2. 359.

## TITLE IV. DISPOSITION OF MOVEABLES (*a*).

46. FORM AND PURPOSE.—(1.) Deeds conveying moveables are evidence merely of the granter's intention to transfer, and do not, even after intimation, effect the legal transference of the subjects conveyed. They are thus of use only as a title whereby to obtain possession when it is refused. This flows from the rule of law, that possession presumes property in moveables. (2.) It is thus necessary that the disponee receive and maintain actual (not merely symbolical) possession of the *ipsa corpora* of the subjects of the conveyance, to have a title in competition with creditors of the disponer using diligence, or a future disponee obtaining corporal possession of them (*b*). (3.) In regard to the terms of the conveyance, see *Disposition and Settlement*.

(*a*) Jur. Styles, 2. 247, *et seq.*
(*b*) Ersk. 3. 5. 1, *et seq.*

# CHAPTER III.

## TESTAMENTARY DEEDS.

### TITLE I. GENERAL PROPERTIES OF TESTAMENTARY DEEDS.

47. INTRODUCTORY REMARKS.—1. *Definition and rules of construction.*—(1.) The word *testament* is a generic term, signifying all those *mortis causa* deeds, whether simple testaments or wills, dispositions and settlements of moveables, trust-settlements of moveables, and bonds of provision to wives and children proceeding from the *good will* of the husband and father, and not granted under an obligation in an onerous contract of marriage or other precedent deed. Testamentary deeds being intended to take effect *a morte testatoris*, from the day of the granter's death, are revocable without an express clause of revocation; and they are regarded as forming the law of the succession of the subjects expressed in them, from that period, as superseding the ordinary rules of law. The will of the owner of property is effectual, when duly expressed, to transmit it to others, either during his own lifetime, or in the event of his death; but the deeds proper for carrying that will into effect are governed by different principles, and expressed in distinct forms. A present right conferred on another (called *inter vivos*) is complete; whereas a conveyance to take effect at the death of the granter (called *mortis causa*) is said to be *ambulatory*, and continues subject to his will, so as to be revocable by a posterior deed. The conveyance last in date is therefore denominated the *latter will*, because, in the words of Stair,

the latter will is always effectual and preferable to the former will (*a*); and in regard to form, it is sufficient that, as regards moveable property, it bear a declaration of intention, whilst a deed intended to have immediate effect takes the form of a direct conveyance. (2.) It may be stated as a general rule, that deeds of a testamentary nature receive a liberal interpretation with reference to the presumed intention of the granter, a rule which indeed applies to all *mortis causa* conveyances, whether of moveables, or even heritage, where technical words of a fixed meaning do not occur to control intention. Hence a testament, to which an impossible condition is annexed, is read as if the condition were not adjected, and thus regarded as a pure testament. Expressions which are ambiguous are, on the same principle, interpreted according to the presumed will of the testator, where such construction is possible (*b*); but the strongest indication of intention to make a testament, even by the preparation of holograph instructions or other authentic modes of preliminary direction, is ineffectual, unless such intention be embodied in the form of a completed writing (*c*). (3.) The various kinds of testamentary deeds have thus necessarily general properties. Their chief object is to express the testator's will to bestow sums of money or articles of value on favoured individuals, under such conditions or restrictions as the sound discretion or arbitrary caprice of the testator may dictate. It is therefore expedient that those properties which deeds of a testamentary nature possess in common, depending on principle and expression combined, should be explained, as preliminary to the analysis of each particular form of settlement.

2. *Law of Scotland founded on the civil law.*—The rules of our law in regard to succession in moveables, whether legal or by provision, are in a great measure derived from the civil law, which, on the subject of testa-

ments, is still of considerable authority. Succession and its kindred subjects occupy a larger space in the Roman law than any other single branch of jurisprudence; and the subtle refinements of the civilians transfused themselves copiously into the practice of a barbarous people, under the direction of ecclesiastics, whose interest it became to regulate the private affairs of individuals by a code familiar, from the language in which it was embodied and its intricate and artificial nature, only to themselves. A succinct account is given by Lord Stair of the Roman law on the subject of testaments, which is sufficient to give a general notion of the subject to those unacquainted with the principles and details of that jurisprudence (*d*).

(*a*) Stair, 3. 8. *Introd.*

(*b*) Ersk. 3. 9. 14. See Stewart, 26th Nov. 1813, F. C., where the Court, in the circumstances of the case, allowed trustees to fill up a blank in the deed of settlement. See M'Lehose, 28th Feb. 1815, F. C.

(*c*) Munro, in House of Lords, 3d July 1813, Dow, 1. 437, and auth. cit.; Walker, 16th Dec. 1825, S. 4. 323; Stainton, 17th Jan. 1828, S. 6. 363; Gillespie, 22d Dec. 1831, F. C., S. 10. 174; Duguid, &c. 4th Feb. 1839, F. C., D. B. M. 1. 473.

(*d*) Stair, 3. 8. 1. *et seq.*

48. NOMINATION OF EXECUTOR NOT ESSENTIAL. — A *mortis causa* deed, to deserve the name of a testament, ought to contain an appointment of one or more persons as executors or heirs of provision of the testator *in mobilibus*; but such nomination is not essential. Testamentary writings are valid and effectual to give a claim against the executor, who, whether heir *in mobilibus*, or appointed by the testator, is equally a trustee for behoof of all having claims on the estate, and as regards the residue, for the next in kin of the testator (*a*). These are called *codicils* when subjoined to or supplementary of a proper testament, and, if distinct writings, are styled simply *legacies*. But a bill or promissory-note, as it is ineffectual for the purpose of

a donation, and not probative unless for the constitution of a *de præsenti* obligation *in re mercatoria*, cannot be employed for giving a legacy, although, after the mercantile obligation is duly constituted, it may be conveyed to a legatee by indorsation (*b*).

(*a*) Stair, 3. 8. 33, 36; Ersk. 3. 9. 5. *et seq.*; Kemps, 2d March 1802, M. 16,949; Jurid. Styles, 2. 432; 1617, c. 14. *Anent executors.*—Our SOVEREIGN LORD understanding a great number of ignorant people the time of their sicknesses and disease, or otherwise at the making of their testaments and latter wills do nominate certain strangers to be their executors meaning only to commit the care of their goods and diligent ingetting thereof to the saids strangers and that to the behoof of their children or other persons who are nearest of kin Whereas by the contrary the said office of executry, by the interpretation now observed doth carry with it the whole profit and commoditie of the defunct's part of the goods contained in testament which his Majesty finds to be altogether against law conscience and equity Therefore his Majesty with advice and consent of the Estates of Parliament FINDS and DECLARES that all Executors already nominate in any testament not as yet confirmed or to be nominate in any testament to be made hereafter are and shall be obliged to make count reckoning and payment of the whole goods and gear appertaining to the defunct and intrometted with by them to the wife, children and nearest of kin according to the division observed by the Laws of this Realm, reserving only to the saids Executors the third of the defunct's part all debts being first payed and deduced without prejudice alwayes to the saids Executors of whatsoever legacies left to them by the saids defuncts which shall nowayes be prejudged by this present Act but the saids Executors shall have full right to their saids legacies, albeit the same exceed the said third of the defunct's part And in case the saids legacies exceed the whole third part the saids Executors shall have right to the whole legacie and no part of the third. WITH this express declaration that where legacies are left to the Executors they shall not fall both the saids legacies and a third by the present Act: but the saids legacies shall be imputed and allowed to them in part of payment of their third.

(*b*) Wright, 11th Feb. 1761, M. 8088, and auth. cit.; 30th Nov. 1752, B. S. 5. 802; Murray, 6th March 1818, Bar. Hume, 275.

49. LEGACY.—1. *General nature.*—The generic term legacy, sometimes styled bequest, is employed to denote a sum of money or moveable subject bequeathed in a latter

will or other testamentary deed or writing, and payable out of the free estate, by the executor named by the testator or pointed out by law, against whom the legatary or legatee has accordingly a right of action for payment or delivery. The free estate, in the sense here used, means the *defunct* or *dead's part*, or what remains after satisfying the legal provisions to the testator's wife and children of *jus relictæ* and legitim, which cannot be affected by *mortis causa* deed, and the debts which form a burden on his moveable estate (*a*). But a testator who is possessed of heritage may render it subject to the payment of legacies, by a conveyance to trustees for that purpose, whether with or without an express clause of sale, a power of sale being necessarily implied; and trust-settlements, embracing both heritable and moveable estate, are of every-day occurrence (*b*). (See *Trust-Settlement.*)

2. *Different kinds of legacies.*—Lord Stair classes legacies into *particular* and *universal*, *special* and *general*, and Erskine's division is nearly alike (*c*). (1.) A universal (contradistinguished from a particular) legacy is a bequest of the *universitas* of the testator's succession, in so far as it is in his disposal; but it may be burdened with sums payable to others. (2.) A special legacy, again, *(legatum speciei,)* is a bequest of a sum contained in a bond, bill or other voucher of debt, or in the hands of a particular individual, or of a piece of furniture, or other moveable subject marked out by special description. And a special legacy of a subject, whereof the testator possessed more than one, which does not point out the individual article intended to be given, is called *legatum generis.* The price of a portion of lands, forming part of a mixed estate of heritage and moveables, appointed to be laid out in the purchase of other lands, and described as residue, is not made a special, and therefore a preferable legacy, by limiting the express power of sale in the settlement to an-

other portion of the lands, provided the whole estate be declared subject to the payment of legacies. A power of sale for payment of all the legacies imposed in the leading part of the deed, as affecting the whole estate, is held to be implied, and there is thus no residue truly in existence until these are paid (*d*). (3.) A general legacy, *legatum quantitatis*, is of a sum of money defined merely by its amount. This sort may partake of the nature of a special legacy by the will of the testator. Thus, an ordinary legacy of a sum of money, declared to be preferably payable, is in so far special that it does not suffer abatement through a shortcoming of funds for the purposes of the settlement, provided there is enough to meet this particular bequest.

3. *Legatum rei alienæ.*—A bequest of a subject not the property of the testator is called *legatum rei alienæ*, a legacy of a thing belonging to another. (1.) A distinction which prevailed in the civil law with respect to a legacy of this nature, founded on presumed intention, has been received in ours; and on the assumption that it is inconsistent with the state of mind of a dying person *ludere in extremis*, the legacy is available to found a claim against the executor, either to acquire the subject for the legatee, or pay its value, provided it was known to the testator to belong to another, and is thus *legatum rei alienæ scienter legatæ*. But the opposite rule holds, where he believed it to be his own; for in this case intention cannot be supposed to extend beyond the subject itself, which the testator thus erroneously conceived to be his property (*e*). (2.) A legacy of an heritable subject, at least of a sum of money heritably secured, or appointed to be paid out of the rents, or the price of heritage, is regarded as *legatum rei alienæ scienter legatæ*, and not *rei alienari prohibitæ*, since, although heritage or heirship moveables cannot be conveyed by testament so as to affect the rights of the

heir (*f*), their value may be imposed as a burden on the executor so far as the moveable estate will go; for he cannot be suffered to approbate and reprobate the same deed (*g*). An exception is said, however, to maintain where the testator believes the subject to be moveable, in which case the executor, as not bound in warrandice, cannot be required to make good its value (*h*); and although the report of the decision relied on by Erskine does not bear this *ratio*, the argument in a later case, which seems to have been well considered, and contains all the authorities, appears to assume the distinction (*i*). The legacy of a special sum, made heritable by a supervening security, was in one instance held to be thereby revoked, although it is to be observed, that as the testator must be presumed to be aware of the change, he is, by preserving his settlement unaltered, in effect bequeathing a special subject knowing it to be heritable (*k*). (3.) A bond secluding executors being heritable by our law, is thus subject to the rules above explained. Such a bond is not carried by a general bequest, nor is it regarded as moveable, so as to fall within the operation of an English will (*l*).

(*a*) Ersk. 3. 9. 22. *et seq.*; Bell, Pr. 1585, and auth. cit.

(*b*) See Hamilton, 14th Feb. 1832, F. C.

(*c*) Stair, 3. 8. 38. *et seq.*; Ersk. 3. 9. 11. *et seq.*, in reference to the whole of this section.

(*d*) Hamilton, as in (*b*).

(*e*) Stair, 3. 8. 41; Ersk. 3. 9. 10; Bell, Pr. 1882. See Catto, 23d June 1748, M. 8076.

(*f*) Traquair, 12th March 1562, M. 5389; Govan, 28th Jan. 1812, F. C., and auth. cit.

(*g*) Stair; Ersk. as in (*e*); and note by Ivory, 586, and cases cit.; 18th Nov. 1671, B. S. 2. 585; Catto, as in (*e*).

(*h*) Stair; Ersk. as in (*e*); Wardlaw, 21st Feb. 1603, M. 5703.

(*i*) Catto, as in (*e*), not noticed in text of Ersk.

(*k*) Ersk.; Stair, as in (*e*); Edmonston, 8th July 1673, M. 13,304. See Paul, 5th July 1821, S. 1. 100, and (2d edit.) 101; Wyllie, 12th Nov. 1825, S. 4. 172.

(*l*) Ersk. 2. 2. 12; Ross, 4th July 1809, F. C. See note by Ivory, Ersk. 248. In the report of the case of Ross there is much information as to bonds of this nature.

50. LEGATARY OR LEGATEE.—1. *Must be certain.*—(1.) The person to whom a legacy is given is called the legatee or legatary. The legatee must be certain, or, in other words, described so as to be distinguished from all others. When, therefore, he is clearly pointed out by the whole designation, *dummodo constet de persona*, and the intention is clear, an error in the Christian name of a legatee, the family name being correct, has been held not to amount to legal uncertainty (*a*). (2.) Uncertainty is removed by leaving a legacy *in arbitrio tertii*, in the discretion of another, who is thus a trustee for fulfilling or rather supplying the wishes of the testator. Thus a sum left to the testator's *poorest friends and relations*, whom he may have forgot in the will or in any other testamentary deed, or to *relations not named in the settlement*, to be divided among them by the trustees therein appointed, or by other persons duly designed, is not void through uncertainty (*b*). Thus also a bequest was sustained, which was appointed to be applied by the trustees expressed in the settlement, *in aid of the institutions for charitable and benevolent purposes established or to be established in the city of G. or neighbourhood thereof* (*c*). In like manner effect was given to the wish of a testator, that the residue of his means and estates should be applied *in such charitable purposes, and in bequests to such of his relations as might be pointed out by his wife, with the approbation of the majority of the trustees named in the settlement*, to whom power was given, in certain events, to make the application without consulting the widow, *in the way and manner they should conceive to be most agreeable to his wishes if in life* (*d*). (3.) A legacy to *each of the children of a marriage*, or *the lawful heirs of A. B.*, has been held sufficiently descriptive of the children

alive at the testator's death; and *the children of a marriage alive at their mother's death, exclusive of the heir entitled to succeed*, do not embrace the eldest son, who, although the father should be alive, is heir-expectant (*e*).

2. *Legacy personal to legatee.*—The general rule of law is that a legacy implies *dilectus personæ*, and is therefore personal to the legatee. This flows from the nature of a *mortis causa* bequest, which, as being ineffectual until the period of the testator's death, must necessarily fall or *lapse* as it is styled by the predecease of the favoured individual, and thus the rule of the civil law, *quod morte legatarii periit legatum*, from which ours is immediately derived, is founded on the nature of a donation to take effect on the occurrence of that event. It follows that a sum bequeathed to one without mention of his heirs, belongs, on his predecease, to the heirs of the testator (*f*). On the same principle, a conditional legacy lapses if the legatee die before the condition is purified. (See *Conditional Legacy*.) As a consequence of the rule stated above, it is, in the ordinary case, necessary to mention heirs or other persons intended to be favoured failing the legatee, when it is meant that the legacy shall not lapse by his predecease. This leads to the important subject of institution and substitution.

(*a*) Ersk. 3. 9. 8; Keiller, 14th Dec. 1824, S. 3. 396; Keiller, 16th June 1826, S. 4. 724.

(*b*) Wharrie, 16th July 1760, M. 6599, 8086. The clause was in these terms: "To the three children of James Wharrie, vintner in Whitehaven, "or survivors of them, share and share alike, the sum of L.750 sterling," &c. "All which legacies being paid, I appoint and ordain my said executor to "remit the surplus of my money to Andrew Binnie, in the parish of Graitney, "and William Johnston in Lanriggs, to be by them divided equally amongst "my relations not herein named, and I appoint the legacies to be paid and "the surplus to be remitted within year and day after my decease."—Brown's Trs. 3d Aug. 1762, M. 2318. The clause was thus expressed: "And the "remainder of the proceeds of my said means and estate, after payment of "the several legacies already bequeathed or to be bequeathed by me, at any

"time of my life in manner foresaid, and of the payment of the expenses of "executing this trust right, to be divided amongst my poorest friends and "relations whom I may have forgot herein, or in any other deed to be made "by me in relation hereto, at any time during my life."—See Gellie, 24th Dec. 1709, M. 8061; Murray, 28th Nov. 1729, M. 4075.

(*c*) Hill, 14th Dec. 1824, F. C., S. 3. 389, affd. W. S. 2. 80. The clause was in these terms: "I appoint the residue of my said estate to be applied "by my said trustees and their foresaids in aid of the institutions for chari-"table and benevolent purposes established or to be established in the city "of Glasgow or neighbourhood thereof, and that in such way or manner, and "in such proportions of the principal or capital, or of the interest or annual "proceeds of the sums to be appropriated, as to my said trustees, and their "foresaids, shall seem proper; declaring, as I hereby expressly provide and "declare, that they shall be the sole judges of the appropriation of the said "residue for the purposes aforesaid."

(*d*) Crichton, 12th May 1826, F. C., S. 4. 553, affd. W. S. 3. 329. The legacy was expressed as follows: "Then it is my wish that such remaining "means and estate shall be applied in such charitable purposes, and in bequests "to such of my friends and relations as may be pointed out by my said dearly-"beloved wife, with the approbation of the majority of my said trustees, "and in the event of her decease, or entering into a second marriage, before "such application shall have been pointed out and approved of as aforesaid, "then I hereby empower the majority of my said remaining trustees to make "the application, in the way and manner they would conceive to be most "agreeable to my wishes if in life."

(*e*) M'Lehose, 28th Feb. 1815, F. C.; Pearson, 28th June 1825, S. 4. 119; Clarke, 11th Jan. 1833, S. 11. 220.

(*f*) Fleming, 6th June 1798, M. 8111; Hamilton, 7th and 8th Feb. 1838, F. C., D. 16. 478.

51. INSTITUTION AND SUBSTITUTION.—1. *Definition.*—(1.) The *institutio hæredis* in the Roman law, was the appointment by the testator of an heir, who, as there was no power to name an heir to the heir, thus necessarily became the absolute proprietor or fiar of the subject or estate bequeathed to him. The term *institute* is thus equivalent to fiar. But although the testator could not give his heir a successor in the proper sense of the term, he might exercise what was called the *substitutio vulgaris*, by providing the estate or subject to another, failing the heir by prede-

ceasing the testator, or in the event of his declining to accept of the right. This substitution was plainly therefore an institution on a condition. This point is farther illustrated by what in the Roman law is called *substitutio pupillaris*, by which a father exercised the power to name an heir to his own heir whilst under age, and thus incapable of testing, and the *substitutio quasi pupillaris* or *exemplaris*, which was competent to him when the incapacity of the heir arose from mental imbecillity, or his being deaf and dumb. (2.) In our law institution has the same meaning, being substantially the appointment of a legatee with an unlimited title, or in other words a right of fee. On the other hand, substitution has a broader meaning than in the civil law, a testator having in the ordinary sense power to name an heir to his heir, or one or more legatees after the first, whether under or above the legal age, in all moveable subjects with the exception of legitim, which, although in some sense a provision of succession, since it vests only in those children who survive the father, it is not in the father's power to dispose of or burden by *mortis causa* deed (*a*); and in this sense the *substitutio pupillaris* or *exemplaris* has no place. But what in that system is styled *substitutio vulgaris*, receives in our law its proper name of conditional institution, the second person named being institute or fiar, on the condition that the first shall have predeceased the term of payment, which is the day of the testator's death, unless a future period be mentioned in the testament (*b*).

2. *Conditional institution contrasted with substitution.*—(1.) The effect of giving the fee of a legacy or provision to another upon a condition, is not to abridge the right of the fiar first named, but simply to transfer the fee to the second in the event of its not vesting in the first. In a destination therefore, by A. *to B., whom failing before the testator, to C.*, B., by surviving the testator, becomes absolute proprietor of the right, which passes accordingly on his death

to his own heir, whether of law or provision, to the entire exclusion of C. But, on the other hand, should B. have predeceased the testator, the conditional becomes an absolute vested right in C. exclusive of the heirs of B., and this seems to have been the precise effect of the *substitutio vulgaris* of the civil law. (2.) A substitution again means the putting C. in the place of B., whether the death of the latter precede or follow that of the testator; and thus it may be constituted by the words, *to B., whom failing before or after me,* (or *the said term of payment,) to C.,* terms which in all substitutions are necessarily expressed or implied. B. is still, however, in one sense the unlimited proprietor of the right, for the law does not recognise a mere destination as sufficient to control the power of the first fiar to dispose of it at pleasure; and therefore, unless the machinery of a trust be interposed, the institute or first fiar may exclude the *spes successionis* of the substitute, by evacuating or voiding the substitution. Substitution is thus a right conditional on the death of the institute, without having exercised the power of disposal, for to him, as Stair expresses it, the right is given, with a tacit power to "alter and dispone at his pleasure during his "life" (*c*). The right of the institute is therefore plainly burdened with that of the substitute, to the effect of controlling the rules of intestate succession, and thus the subject passes to the substitute, or, should he have died before the institute, to his heir, in preference to the heir *in mobilibus* of the institute (*d*). It is therefore a question of much practical importance, in construing settlements, whether a destination be in the form of a proper conditional institution or of a substitution. (3.) The presumption of law being opposed to restraint, it follows that, *in dubio,* conditional institution prevails. This rule was of old clearly understood, but, at a later period, the presumption seems to have been the other way (*e*),

although in the civil law substitution, in the proper sense of the term, which imports tailzied succession, was unknown. More recently, however, the old notion has prevailed; and thus, although substitution is competent, and may by express words be effectually constituted, the presumption, as already stated, is in favour of conditional institution (*f*). (4.) A bequest, absolutely bestowed, as at a specified period, is not controlled by a condition in favour of another, expressed in general terms as to time. Such a condition is construed consistently with an absolute right in the legatee. Thus, a declaration that a legacy, payable at majority to B., shall belong to C., *in the event of B.'s dying without children, or without being married*, is held to refer to the period prior to B.'s majority, and consequently to import a conditional institution, and not a substitution of C. to B.'s heirs-general (*g*).

3. *Terms of conditional institution.*—(1.) In the simple case of a legacy to two parties consecutively, there is little nicety of expression required. It is plain, as above stated, that a destination by *A. to B., whom failing before me, to C.*, will constitute a conditional institution, and the terms to *B., whom failing before or after me, to C.*, a substitution. But it is seldom, in framing settlements where numerous parties are concerned, and by which large interests are disposed of, that clauses of destination are of this simple structure. They necessarily vary according to the wishes of the testator, whether formed on due deliberation, or dictated by mere caprice; and as intention is the ruling principle in the determination of questions on testamentary deeds, the construction of clauses becomes, in numerous instances, of great difficulty. Hence, and from the accumulation of moveable property, aided by a too anxious desire in its possessors to regulate its transmission and enjoyment for long periods of time, have arisen numerous ques-

tions on the subject of testate succession, in the more recent practice of the Court. With regard to questions of this nature it is impossible to lay down any fixed rule of construction, as is manifest from the often conflicting opinions of the Judges. But these furnish a lesson to the conveyancer to employ in settlements language which can admit of no dubiety. (2.) The terms, to *B. and his heirs, or his heirs, executors and assignees or successors*, import a conditional institution of the heirs (*h*), and have likewise all the effects of a substitution; but the terms, *executors or next of kin*, used without qualification, import executors by law only, and not executors by express appointment or provision (*i*); yet, on the principle of intention, the Crown, as *ultimus hæres*, is excluded (*k*). (3.) Thus also, to *B. in liferent, and the heirs of her body in fee, whom failing, to C.*, were held to be a conditional institution, not a substitution of C.; so that, on the death of a child of B., the right passed to his heir in preference to C.; but the case has been regarded as not free from specialties, and therefore this form of expression is to be avoided in practice (*l*). (4.) A conditional institution may be made by providing a sum *to B., and in the event of his not claiming within a certain period, to C.* (*m*). (5.) In all these cases there occurs the proper test of a conditional institution, that when the existence of the condition becomes impossible by the lapse of the period within which it must take place, the bequest belongs absolutely to the first fiar, and passes to his heirs, to the exclusion of the conditional institute and his heirs. (6.) As it is of the nature of a conditional institution to flow from the testator, such terms as, *to B., with power to distribute the amount among C., D.*, &c. import no right in C., D., &c. under the settlement, but an absolute fee in B., which will lapse by his predeceasing the testator; but the words, to *B., to be held and enjoyed by*

*him, his heirs and assignees*, have been considered equivalent to a conditional institution of the heirs (*n*).

4. *Terms of substitution.*—The terms *to B., whom failing, to C.*, may be relied on as giving a right to C., on the predecease of B. before the testator, who takes in that event as conditional institute; but it is not clear that they constitute a proper substitution, so as to carry the right to C. in the event of B. dying after that period, and being survived by C.; and therefore to remove all ambiguity, the words, *before or after me*, should be introduced after *whom failing*. The result of the cases on this head seems to be, that the effect of the terms, *whom failing*, taken separately, cannot be relied on as importing a substitution. The old rule is undoubted, that substitution, or tailzied succession in moveables, was not received in our law; and although that rule was afterwards relaxed, (above, Art. 2,) the Court do not seem to have gone farther than to sustain substitutions, if constituted by words which do not admit of a contrary interpretation. In an early case the terms, to *B., and failing him by decease to C.*, were held to import a tailzied succession and proper substitution, and the same view prevailed in a later instance where the words were of similar import (*o*); but more recently it was held, after a hearing in presence, that the terms, to *B. in liferent, and the heirs of her body in fee, whom failing, to C.*, imported a conditional institution, and not a substitution of C.; and that although tailzied succession might take place in moveables, these were not naturally the subject of such a destination, which was therefore not to be presumed *in dubio* (*p*). Although, in later cases, the words *whom failing* have been referred to as formal terms for expressing a substitution, this effect has not been ascertained by any express finding (*q*). In a recent instance (*r*), the destination was of heritage and moveables jointly, and the undoubted force of the words *whom failing*, in a substitution

in heritage, appears in some degree to have entered into the question of intention, in construing the clause with relation to the moveables.

5. *Implied institution and substitution of children.*—(1.) In a particular class of cases, a condition maintains, *conditio si institutus sine liberis decesserit*, derived from the Roman law, which has the effect of transmitting the right to the children or issue of a legatee, although not expressly mentioned in the testament, so as even to evacuate an express substitution to another. This condition is founded on a presumption, arising from natural affection, (*conjectura pietatis*,) that a testator, *in loco parentis*, prefers the children (a term which includes direct issue (*s*)) of the persons favoured in his settlement, to a substitute who is a stranger or more remote relation. (2.) The effect of the condition has long been recognised in the case of a bequest of the whole or a considerable part of his estate, by one who had no children at the date of the settlement, which, if supported, would exclude his own issue born after that period, unless in special circumstances inferring an intention to disinherit such issue; *e. g.* where a testator, after the birth of a child, survives the date of his settlement for a considerable period, or refers to it as an existing deed. In these circumstances, the presumption on which the condition is founded is plainly excluded (*t*). This example of the application of the condition may be called an implied conditional institution of the testator's issue. (3.) But the more ordinary application of the *conditio si institutus sine liberis decesserit*, is to the situation of descendants of legatees to whom provisions are made in a general family settlement of a near relation. A single legacy, to which heirs are not substituted, lapses, as has been seen, by the decease of the legatee before the term of payment. It is presumed to be given from favour to the individual, and thus to imply *dilectus personæ*, a pre-

sumption which is excluded when the bequest is to a class or family of relations, whether in the direct or collateral line, with a substitution of the survivors. The children in this case are supposed to be equally the objects of the testator's regard as their parents, and are preferred to the survivors of the immediately favoured class for the shares of the parents; but where the provision is made to certain relations as individuals, to the exclusion of others, and not to the whole as a class, or the mention of heirs in another part of the settlement negatives the presumption that the testator did not contemplate that the legatees would die without leaving children, the ordinary rule of law has effect (*u*). (4.) An implied substitution of grandchildren (or direct issue,) founded on the principle of *paterna pietas*, maintains in provisions by a father to a child, whether singly or as one of a class, and whether there be or not an express substitution of another failing the child, to the effect of passing the right to the issue of the child, on his predecease before the term of payment (*v*), although not to his heirs-general (*w*). But the ordinary rule of law has effect when the legatee is merely in the collateral line of relationship (*x*).

(*a*) Ersk. 3. 9. 22. *et seq.*; Bell, Pr. 1585, and auth. cit.

(*b*) Ersk. 3. 8. 44.

(*c*) Stair, 3. 5. 51.

(*d*) Walker, 7th Dec. 1744, M. 10,328.

(*e*) Stair, 3. 5. 51; Ersk. 3. 8. 44.

(*f*) Christie, 13th July 1681, M. 8197; Campbell, June and Nov. 1740, M. 14,855, and Cr. and St. 1. 343; Robertson, 2d June 1742, Elch. *Legitim*, 6; Brown, 2d June 1792, M. 14,863; Johnston, 28th June 1831, F. C., S. 9. 806, and in House of Lords, W. S. 6. 406; Ramsay, 23d Nov. 1838, F. C., D. B. M. 1. 83.

(*g*) Johnston, as in (*f*); Ramsay, 26th June 1833, F. C., S. 1. 1786; Duncan's Trustees, 11th July 1837, F. C., S.

(*h*) Inglis, 16th July 1760, M. 8084; Horsburgh, 13th Feb. 1781, M. 8099; Graham, 17th Feb. 1807, M. App. *Legacy*, No. 3.

(*i*) Lawsons, 24th Jan. 1826, F. C., S. 4. 384, aff'd. W. S. 2. 625. The clause was in these terms: "And it is hereby also specially declared,

"that in the event of the death of any of the said legatees prior to the "survivor of us, his, her or their legacy or legacies shall thereby fall and "belong to their *executors or nearest of kin;* but in the event of any of the "said legatees predeceasing either (both) of us, then his, her or their legacy "or legacies shall fall and lapse, and be at our disposal."

(*k*) Torrie, 31st May 1832, F. C., S. 10. 597.

(*l*) Brown, as in (*f*).

(*m*) Stevenson, 30th June 1826, S. 4. 776.

(*n*) Scots, 13th Dec. 1769, M. 8090. (*Clause.*)—"To Isobel Swanston, "my well-beloved spouse, the sum of 1500 merks, and that at the first term "of Whitsunday or Martinmas after my decease, with annualrent after the "term of payment, and which sum of 1500 merks the said Isobel Swanston "shall leave and distribute among her daughters at her death, as she shall "think fit."

Ef of Moray, 15th Dec. 1782, M. 8103. (*Clause.*)—"To my niece, Mrs "Stuart, for her own proper use, exclusive of her husband's *jus mariti*, all "the rest of my household furniture, clothes, &c., and I hereby appoint "that *the whole residue* of my estate and effects, heritable and moveable, or "proceeds thereof, remaining after answering and satisfying the special "appointments and provisions made by me, as above, shall be paid and de-"livered, or secured by my trustee to and for the use and behoof of the said "Mrs Stuart, and shall be held and enjoyed *by her, and her heirs and assig-"nees,* as her own property, without being subject to the *jus mariti* of her "husband, which is hereby excluded."

(*o*) Campbell, Robertson, as in (*f*).

(*p*) Brown, as in (*f*).

(*q*) Johnston, as in (*f*). (*Clause.*)—"The said Jean Whittet" (the universal disponee) "and her foresaids shall pay to each of my grandchildren, "John and Wilhelmina Johnston, the sum of L.2500, at the first Whitsun-"day or Martinmas after they respectively have attained the age of twenty-"one years complete, with the legal interest of the same from and after "the first term of Whitsunday or Martinmas after my death, ay and until "the same is paid; it being provided, that in the event of the death of "either of the said John and Wilhelmina Johnston, without lawful children, "the survivor shall succeed to the share of the predeceaser; and in the "event of the death of both without lawful children, the said Jean Whittet "and her foresaids shall succeed to the whole of what is herein provided to "them." Under this clause Jean Whittet was held to be a substitute and not a conditional institute. See opinions of Lords Mackenzie and Corehouse as to the effect of the terms *whom failing.*—Ramsay, as in (*f*). (*Clause.*) —"I hereby direct my said trustees, and the acceptors or acceptor, survivors "or survivor of them, to dispone, convey and make over the residue and "remainder of my foresaid real and personal, or heritable and moveable

"estate," *(excepting and including certain specified sums,)* "to and in favour "of William Wardlaw Ramsay, my eldest son, procreated of the marriage "between the said Lady Anne Lindsay, otherwise Wardlaw Ramsay, and "me, and the heirs whomsoever of his body; whom failing, to Robert "Wardlaw Ramsay, my second son, and the heirs whomsoever of his body; "whom failing," (to the testator's other sons and his daughters *seriatim*, in similar terms); "whom failing, to my own heirs or assignees whomsoever." See note of Lord Fullerton, Ordinary, and opinions of Lord President Hope, and Lords Mackenzie and Corehouse.

(*r*) Ramsay, as in (*f*).

(*s*) Glendinning, 30th Nov. 1825, F. C., S. 4. 237; Lord Glenlee, in Booth, 8th Feb. 1831, F. C., S. 9. 406.

(*t*) Ersk. 3. 8. 46, and auth. in text; Colquhoun, 5th June 1829, F. C., S. 7. 709. See opinions of Lords Glenlee and Pitmilly.

(*u*) Ersk. 3. 8. 46; More's Notes on Stair, 345; Young or Greig, 3d and 5th March 1835, F. C., S. 13. 607; Hamilton, 7th Feb. 1838, F. C., D. 16. 478, which contains all the authorities. See note of the Lord Ordinary, (Jeffrey,) and opinion of Lord Meadowbank, and on the other side the opinion of Lord Medwyn, in which the majority concurred; Clelland, 18th June 1839, F. C., D. B. M. 1. 1031.

(*v*) Wood, 26th June 1789, M. 13,043; Binning, 21st Jan. 1767, M. 13,047; Neilson, 4th June 1822, F. C., S. 1. 458; Dixons, 10th June 1836, F. C., D. 14. 938; Lord Medwyn, in Hamilton, 7th and 8th Feb. 1838, F. C., D. 16. 478.

(*w*) Omey, 19th Nov. 1788, M. 6340, 12,973.

(*x*) Wishart, 16th June 1763, M. 2310; Fleming, 6th June 1798, M. 8111; Lord Glenlee, in Dixons, as in (*v*).

52. EVACUATION OF SUBSTITUTION.—A substitution, when duly constituted, has the effect of passing the right to the substitute or his heirs in preference to the heirs of the institute, on the death of the latter without having altered or evacuated the destination. It is important, therefore, to inquire by what means a substitution may be evacuated. (1.) The rule seems to be, that as the right is under the absolute control of the institute, and each substitute in his order, and so may be disposed of to the prejudice of a future substitute even gratuitously, it is enough, in order to evacuate a substitution, that the institute or substitute in the immediate right sufficiently show his intention to defeat the substitution by altering the destination, or im-

mixing the subject of the bequest with his own funds; and for that purpose he must be above pupillarity. A substitution is accordingly evacuated by payment, or a demand of payment at a specified term, although payment has not followed, provided the delay be not attributable to the institute; or by a deed conveying the right to another, even *mortis causa;* but a testamentary deed, prior in date to the period at which the right vested, will not afford evidence of intention so as to carry the right away from the substitute, at least where the institute had not survived the date at which he became aware of the existence of the bequest, without revoking the deed (*a*). The legal assignation to the husband of a wife's moveables in like manner evacuates a substitution (*b*). (2.) But it has been held that a substitution is not evacuated by the mere confirmation of the right by the institute, or even decree obtained at his instance against the executor (*c*).

(*a*) Craik, 26th June 1739, M. 16,342; B. S. 5. 607; Duff, 11th Jan. 1745, M. 5429; B. S. 5. 741; Campbell, Nov. 1740, M. 14,855, and Cr. and St. 1. 343.

(*b*) Smith, 17th May 1801, M. App. *Substitute and Conditional Institute,* No. 1.

(*c*) Christie, 13th July 1681, M. 8197; but see Campbell, as in (*a*), and Brown, 2d June 1792, M. 14,863, where this thought to go too far.

53. EFFECT OF TRUST.—(1.) To prevent the evacuation of substitutions in legacies, which, in many instances, are intended to operate as a destination in liferent and fee, and for other purposes not attainable by the simple style of the latter will, the trust-settlement has become the prevailing form of the testament. (See *Trust-Settlement.*) Deeds of a testamentary nature are thus, in modern practice, of much complexity. Originally the executor named by the testator or pointed out by law was regarded as a trustee for all interested, to the effect of recovering and dividing the estate. But when the accumulation of pro-

perty, and the conventional exclusion or modification of the legal rights of widows and children required new forms of settlement, it became necessary to invent machinery for holding and preserving, as well as for collecting and distributing, the estates of deceased persons. This could only be done by prolonging, so to express it, the power of the testator after death, by means of a trust for the management of the estate until his whole wishes should be fulfilled. In this manner the right to a legacy, which, under the simple form of the testament, was a *jus exigendi* as against the executor, might be restricted to a *jus crediti* as against the trustees, incapable of being enforced before the occurrence of certain conditions or events, *e. g.* until a liferent had expired, or the entire number of a family, among whom a bequest was to be divided, become fixed by the death of a parent, or a party for whom the fee was ultimately destined reached a certain age, or survived a series of prior substitutes. (2.) But it does not appear that an express trust has any effect in altering the ordinary rules of law in regard to the substantial rights of the favoured parties, unless words are used which not merely restrain the *jus exigendi*, by postponing the term of payment, but likewise suspend the vesting of the bequest; for every executor is, in a certain sense, a trustee for the purposes of the testament by which he is appointed, or which he is by law bound to implement. It is plain, however, that the machinery of a continued trust, by creating a fiduciary fee, and thus preventing the evacuation of substitutions, enables a testator to impose conditions on the rights of legatees, and limitations on the claims of favoured parties, which would be entirely inconsistent with the nature and objects of a simple testament or latter will. And as a direction to trustees to hold a sum of money for one party, and, failing him, for behoof of another, shows, in the strongest manner, the purpose of the testator that the

latter should have the fee in preference to the heirs of the former, the presumption in favour of conditional institution is thus removed, and a clause of this purport is interpreted to be a substitution (*a*). But, in correct language, either institution or substitution seems inapplicable to the right; for the only fee truly in existence whilst the vesting of a bequest is suspended, is the fiduciary fee in the trustees. (3.) A trust is of essential advantage for protecting the interest of a party who is to take, in a certain event, a legacy which has in the meantime vested in another (*b*). A bequest thus defeasible would, in many instances, be lost to the party conditionally favoured, but for the fiduciary fee in the trustees.

(*a*) Duncan, &c. 27th June 1809, F. C.; Lord J. C. Boyle, in Mowbray, 9th July 1834, F. C., S. 12. 910, affd. S. and M'L. 2. 305; Lord Corehouse, in Mure's Trs. 25th May 1837, F. C., D. 15. 1005.

(*b*) See Johns, 29th Nov. 1833, S. 12. 146.

54. VESTING OF LEGACIES.—1. *Ingredients in questions as to vesting.*—The inquiry, whether a legacy has vested in or become the absolute, at least the disposable, property of the legatee, depends on a combination of the principles and rules, or some of them, referred to in the preceding sections. There must necessarily be a sum or subject and a favoured person: the other circumstances essential to the vesting depend upon the terms of the particular settlement, which may or may not contain conditions qualifying the existence or extent of the legacy itself or affecting the term of payment; and legacies are thus *pure* or *conditional.*

2. *Legacies which are pure vest a morte testatoris.*—(1.) The rule of law is, that a legacy to which a particular day is not adjected belongs to the legatee at the instant of the testator's death; for it is then that the right created by the execution of the settlement becomes absolute

in place of merely contingent; and the presumption seems *in dubio* to be in favour of this term of vesting (*a*). It follows, that a bequest by two persons in a joint settlement, without mention of a term of payment, vests on the death of one, unless a power of alteration has been reserved to the survivor (*b*). (2.) But when a term is expressed by date or the occurrence of an event which must certainly happen, although the payment of the principal and the currency of interest should in the meantime be suspended, such term regulates the vesting; (below, Art. 3.) (3.) A legacy necessarily belongs to the person who answers the description applied to the legatee at the period of vesting; and thus a legacy to *the lawful heirs of A. B.* vests in the children of A. B. alive at the testator's death. In like manner, a provision *to the children of a marriage, exclusive of the heir entitled to succeed*, embraces all the children in existence at the period of vesting, except the eldest son, who, although the father should be then alive, falls under the exclusion as heir-expectant (*c*).

3. *Conditional legacies.*—The term conditional applies to legacies given to the first person named, under a condition. (1.) Thus, a legacy bequeathed *to C., on the failure of the children of B.*, remains in suspense while these children may exist (*d*). Thus also a legacy given in consideration of future services, or the acceptance of an office, or provided the legatee return from abroad to claim it within a certain time, depends upon the event (*e*). (2.) Again, where a legacy is bequeathed to *B., on his arriving at the age of twenty-one*, or *on the death of his father*, or at any other period of time subsequent to the testator's death, whether fixed or uncertain, it is plain that the property or fee of the legacy cannot vest until the arrival of such period. But when the postponement applies to the term of payment, a distinction has been received in our practice, borrowed from the maxim of the Roman law, *Dies incertus pro condi-*

*tione habetur, non dies certus;* and thus an uncertain term of payment is regarded as a condition, but not a term which must arrive without reference to the existence of the legatee. For example, a declaration, that a sum *hereby bequeathed to B. shall be payable at the first term of Whitsunday, &c. after the death of the longest liver of the testator and his spouse*, was held to refer to a certain day, and the legacy to vest from the testator's death (*f*); not so a provision that a legacy should be payable to B. *at and against the next legal term after his attaining twenty-one years complete*, although power was given to pay it sooner if the executors thought fit (*g*); for although the point of time at which the legatee, if still existing, behoved to attain that age was certain, the stage in the life of the individual at which the legacy was declared to be payable, viz. his majority, was plainly uncertain. This approximates closely to a prior case, where a bequest to B., *to be paid when he is sixteen years of age*, was held to vest *a morte testatoris*, on the ground that, although the life of the legatee was uncertain, the point of time to which reference was made must arrive (*h*); and the authority of the prior case may perhaps be thought to be thus overruled. (3.) But the mere postponement of the term of payment during the subsistence of a right of liferent in another does not create a legal uncertainty. A legacy *to B. in liferent, and C. in fee*, or conveyed to trustees, with directions to pay the interest to one during his life, and the capital to another on the death of the liferenter, without qualifying words or ulterior destinations, belongs to the fiar from the day of the testator's death, when a particular term of vesting is not expressed or implied, burdened only with the liferent; because the substantial, although not the beneficial right, is thus immediately conferred (*i*). In such cases, where there is no trust for the intermediate investment of the bequest, the joint discharge of the fiar and liferenter has been held suffi-

cient for the executor's exoneration (*k*). (4.) Much less can the postponement of the term of payment have a suspensive effect, when the beneficial as well as the substantial interest is in the legatees, and the trustees have merely a right of administration (*l*).

(*a*) Ersk. 3. 9. 9. The Lord Chancellor, (Cottenham,) in Pearson, &c. 16th and 18th July 1839, Jurist, 12. 105, has the following observations: "In a case of this kind very little assistance is to be derived from reference "to authorities; for though the general rules are very well understood "both in this country and in Scotland, yet where there are particular ex-"pressions used on the face of an instrument leading to the indication of "intention, they would govern—the leading rules apply only where there is "no particular indication. The earlier cases in this country," (England,)—"cases where there is nothing to lead to the contrary conclusion as to the "testator's intention,—have a very strong tendency to refer the provision "to the period of the testator's death. The later cases have very much de-"parted from that rule, and notwithstanding the very strong opinion ex-"pressed by Sir John Leach, in one of the cases referred to, it may be "considered that the point is not now very distinctly established as a dis-"tinct proposition; but, in the one class of cases or the other, it must be "regulated by the expressions used by the testator."

(*b*) Nicolson, 16th Dec. 1806, M. App. *Legacy*, No. 2; Lawsons, 24th Jan. 1826, F. C., S. 4. 384, affd. W. S. 2. 625.

(*c*) Pearson, 28th June 1825, S. 4. 119; Clarke, 18th Dec. 1832, S. 11. 220.

(*d*) Carstairs, 21st June 1762, M. 2992.

(*e*) Ersk. 3. 9. 8; Bell, Pr. 1881, and cases cited.

(*f*) Wallace, 28th Jan. 1807, M. App. *Clause*, 6.

(*g*) Sempells, 15th Nov. 1792, M. 8108. See V. Oxenford, 23d Feb. 1671, B. S. 2. 525; Omey, 19th Nov. 1788, M. 6340; Grindlay, 1st July 1814, F. C. These three were cases of provisions to children, but the rule seems to be the same. See opinion of the Court in Omey; and in this case an appointment to pay interest from the term following the testator's death did not affect the determination.

(*h*) Burnets, 9th Dec. 1783, M. 8105. See to the contrary, Bells, 1st Feb. 1749, M. 6332; Sempells, as in (*g*).

(*i*) Fowke, 1st March 1770, M. 8092; Turnbull, 28th July 1778, M. 4248; Wallace, 28th Jan. 1807, M. App. *Clause*, No. 6; Jordan, 22d June 1809, Bar. Hume, 260; Nisbet, 27th June 1809, F. C.; Davidson, 13th Feb. 1828, F. C., S. 6. 536; Ramsay, 26th June 1833, F. C., S.

11. 786; Smith, 30th May 1834, F. C., S. 12. 646. See note of Lord Moncreiff; Brockie, 18th Feb. 1836, F. C., D. 14. 521. See note of Lord Jeffrey; Mure, 25th May 1837, F. C., D. 15. 1005. See note of Lord Corehouse; Duncan's Trs. 11th July 1837, F. C., D. 15. 1273; Forbes, 26th Jan. 1838, F. C., and D.

(*k*) Nisbet, as in (*i*).

(*l*) Wood, 2d July 1813, Bar. Hume, 271.

55. TERMS SUSPENSIVE OF VESTING.—1. *Intention the ruling principle.*—(1.) The difficulty in construing clauses in liferent and fee, or embracing a series of substitutions, arises from the use of words of uncertain meaning, whence the intention of the testator must be gathered in circumstances often involving much nicety of interpretation. As intention is the ruling principle in testamentary deeds, it is to be inferred from the whole scope of the clauses, and in the greater number of instances, there are truly no tests by which to arrive at any certain result; for although presumed intention must yield to the ascertained meaning of technical terms (*a*), it often happens that such terms are employed in destinations of moveables in a way which does not exclude construction. (2.) It is perhaps to be regretted that the course of our decisions has left so much latitude in the mode of applying this principle of interpretation. Intention is necessarily a leading principle in the interpretation of all deeds; but in those which relate to the transmission of heritage, it is never separated from the technical meaning of the terms employed in the essential clauses. The granter of a disposition or feu-charter of lands must express his intentions in a particular form; and as the law requires the employment of certain words of style, conveyancers direct their practice accordingly. The opposite rule in testamentary deeds has produced much laxity of practice, and hence in a great measure have arisen the numerous questions in regard to testate succession; for not only are the leading terms of the

clause by which the bequests are given, allowed to be controlled by other words in the same clause, but also by words occurring in other clauses of the deed. It is therefore only by a careful study of the decided cases that a knowledge of the intricate questions which have arisen in regard to the vesting of legacies is to be acquired. (3.) Endeavours have indeed been made to ascertain some practical test for the determination of cases depending on the terms of a destination in liferent and fee; in other words, for discovering in what circumstances a *jus crediti* exists. In one instance, where the destination was of some complexity, a learned judge expressed an opinion, that although a trust is a contrivance by which it is no doubt possible to suspend the vesting of any beneficial interest in a provision, either during the subsistence of a liferent, or even for a longer period, it by no means follows that a wish and intention to this effect is to be presumed from the mere fact of a trust having been constituted; that the practical result appeared to be, that whenever the fee is finally destined (on the expiration of the liferent) to a certain individual, or to a single definite class or description of persons, without any ulterior provision or destination whatever, the right will vest from the death of the testator, in the same manner as if there were no trust; but that where the destination is to a succession of persons beyond those first named as fiars, the right, if no specialty exist, will not vest in any of them, but remain in the trustees, until it appear, on the termination of the liferent, to which of their number it truly belongs (*b*). The distinction thus drawn was however dissented from by the Second Division of the Court in reviewing the Lord Ordinary's judgment, as leading to a test of decision, at the same time that they acquiesced in the result in the particular case (*c*). But, in a later instance, it appears to have been in substance adopted by another learned

judge, and sanctioned by the First Division of the Court (*d*). So long, however, as the principle of presumed intention, inferred from the scope of the whole clauses of the settlement, is held absolutely to control the terms of a bequest in all cases belonging to that numerous class where construction is not absolutely excluded by precision of language, it is plainly impossible that any rule such as that above indicated, even if well established, could operate as a universal test in questions as to vesting. The ultimate remedy must rest with conveyancers, who ought in practice to adopt the expedient of declaring, in express terms and unequivocal language, in what persons, by name or sufficient description, the provision is meant in the first instance absolutely to vest, and to discourage the prevailing desire on the part of testators to look beyond the interests of the parties immediately benefited, and perpetuate their influence after death by minute and prolix destinations and rules, which, as they cannot anticipate every possible occurrence, of necessity cause a reference to judicial determination when any unforeseen event obstructs the management. In the present state of the practice, it is only surprising that the opinions and decisions of the Judges, conflicting as they have inevitably been in no inconsiderable degree, are not found more contradictory.

2. *Particular cases.*—(1.) The following are some of the more prominent forms of expression of acknowledged weight in judging of the testator's intention to withhold a power of absolute disposal from the fiar, prior to the term of payment. Thus, where a bequest is made in favour of that member of a line of heirs in an entail of an heritable estate, who shall be in possession at the death of an annuitant of the sum bequeathed (*e*); or is to be divided among the lawful children procreated and to be procreated of an annuitant, or other persons referred to as existing at the death of an annuitant,—who cannot therefore be posi-

tively known until that period arrive (*f*); or is to belong to the intended fiar, if he shall be in life at the time of the annuitant's death,—words which necessarily imply an intention on the part of the testator that the bequest shall not sooner be at his disposal (*g*); or is made subject to conditions that may alter the destination of part of the principal sum prior to the term of payment, and thus affect the amount to be divisible among a class of legatees (*h*); or where the liferenter of a legacy is to be a sharer in the fee as it shall extend on the occurrence of an event (such as marriage) which is to evacuate the liferent (*i*); or where the essence of a fee, (liability for debts and the power of disposal,) is expressly withheld until actual payment of the legacy has been made (*k*); or when predeceasing the period of division is put on the exact footing of predeceasing the testator, *e. g.* by a clause of return applicable to either event (*l*); or the right of postponed parties is only to emerge on the failure of those primarily interested to claim within a fixed period, and thus the period set apart for these to take the bequest is necessarily exclusive (*m*);—in these and the like instances the vesting is suspended. Such cases have, for the most part, been regarded as examples of substitutions made indefeasible by withholding the fee of the bequest from the favoured parties, and vesting it as a fiduciary right in the trustees, to await the period contemplated by the testator for its ultimate payment or distribution (*n*). But, in correct language, either institution or substitution seems inapplicable, as observed above, in § 53. A discretionary power of division to trustees of an unlimited nature seems also to prevent the vesting of a provision prior to the actual allotment, although such must be capable of being enforced after the arrival of the period expressed in the settlement (*o*). (2.) On the other hand, the omission of terms clearly suspensive with reference to one of a series

of substitutes will enable him to plead the ordinary rules of law (*p*); and as a *jus crediti* is necessarily implied in the *jus exigendi*, a direction to trustees to pay over a legacy to a particular party, not expressly qualified by suspensive words, being a direction to denude, is inconsistent with a farther continuance of the trust (*q*). (3.) In the class of cases referred to at the end of § 54, art. 3, there were no ulterior destinations for whose protection the trust was to operate, so as to raise the inference that the testator meant the fee to continue in the trustees until the expiry of a liferent, or other period pointed out by the testator (*r*). Cases, however, will be found in both classes which it is difficult to reconcile with any known rule of interpretation, and whose determination must have resulted from presumed intention, inferred from the general scope of each individual settlement; and circumstances, such as that children are unnamed or unborn, which, in a narrow case, may have furnished elements for judging of intention, have, in others, been rejected as of no importance (*s*).

(*a*) Lord Gillies, in Mure, 25th May 1837, F. C., D. 15. 1005.

(*b*) Lord Jeffrey, in Brockie *v.* Marchbanks, 18th Feb. 1836, F. C., D. 14. 521. (*Excerpt from his Lordship's note.*)—" The other part of the case " belongs to a class of questions as to which there is often great difficulty, " and resolving, as they do in a great measure, into *quæstiones voluntatis*, it " is not easy to deduce from the decisions any rule or canon of interpre- " tation of universal application, or even, at first sight, to reconcile some " of these decisions with others. On considering the whole series of au- " thorities, however, the Lord Ordinary thinks the present case sufficiently " clear.

" He is of opinion, in the first place, that the trust-settlement of Mrs " Hutchison clearly provided the liferent of this L.400 to Colville, and the " fee to Mrs Brockie. She does not use these technical words, indeed; but " that the substance of the provision it to this effect, there can be no doubt. " In the next place, he thinks it equally clear, that, under such a provision, " if made without the intervention of trustees, the fee would vest imme- " diately on the death of the testator, and might be effectually conveyed by " the fiar, although ultimately predeceasing the liferenter. The only real

" difficulty, therefore, is as to the effect of the trust, a contrivance by which " it is no doubt possible to suspend the vesting of any beneficial interest in " such a property, either during the subsistence of a liferent, or even for " a longer period, if such should appear to have been the wish and inten- " tion of the granter. But it by no means follows that such a wish and in- " tention is to be presumed from the mere fact of a trust having been con- " stituted; and the practical rule rather appears to the Lord Ordinary to " be this, that wherever the fee is *finally* destined, (on the expiration of " the liferent,) to a certain individual, or to a single definite class or de- " scription of persons, without any *ulterior* provision or destination what- " ever, the right will vest from the death of the testator, exactly as if there " had been no trust; but that, where the destination is to a *succession of* " *persons* beyond those first named as fiars, the right, if there be no specialty, " will not vest in any of them, but remain in the trustees, till it appears on " the termination of the liferent to which of them it truly belongs. In " the first case, there is in truth no legal contingency, and no legal intelligible " motive for suspending the vesting or postponing the power of disposal, there " being from the beginning no doubt of the person by or through whom the fee " *must* be taken, and the testator having no views or wishes beyond that per- " son; whereas, in the latter it is natural to suppose, that having named a suc- " cession of persons, one or other of whom is to take on the termination of the " liferent, he did not mean to give any of them a power to disappoint that " contingent right of succession, by exercising a power of disposal by anti- " cipation, and may therefore be fairly presumed to have left the fee in the " trustees, on purpose to avoid such a disappointment. In the other case, " the presumption would be, that the trust was meant only to secure the in- " terest of the liferenter, and to protect the funds till its termination."

(*c*) Opinion of the Second Division of the Court in Brockie, as in (*b*). Lord Moncreiff, in Porterfield's Trustee, 16th Dec. 1836, F. C., D. 15. 257, also dissents from Lord Jeffrey's view.

(*d*) Lord Corehouse, in Mure, as in (*a*).—(*Excerpt from his Lordship's note.*)—" When a legacy is left to one person in liferent and another in fee, " the subsistence of the liferent does not prevent the fee from vesting at " the death of the testator, and the rule appears to be the same when a " fund is conveyed by the testator to trustees, with directions to pay the " interest to one person during his life, and the capital to another at the " liferenter's decease. See the case of Wallace, (28th Jan. 1807,) which " is the leading one upon the subject: at least this is the rule when there is " a destination of the fee to an individual simply, and no ulterior substitu- " tions which require the trust to be kept up for the benefit of the substi- " tutes.

" If this clause had remained unrevoked, it is thought that the fee of the " residue would have vested in his niece and nephews from the date of the

"truster's death, agreeably to the decision in the case of Wallace, just re-
"ferred to, which ruled the case of Marjoribanks, (18th Feb. 1836,) and
"several intermediate cases. These decisions have not been shaken by
"Mowbray *v.* Scougal and others, 9th July 1834; for in that case there
"was a series of substitutions to various persons in liferent, and others in
"fee, after the extinction of the first liferent, which raised the inference that
"the truster meant the trust to subsist after the first liferents had expired;
"and consequently, that the fee was to remain in the trustees for the benefit
"of the substitutes after that event had taken place. That presumption
"appears to the Lord Ordinary to have run through all the cases which
"seem at first sight to be opposed to the judgment in the case of Wallace."
See also opinion of the Court.

(*e*) Davidson, 13th Feb. 1828, F. C., S. 6. 536. (*Clause.*)—"And also
"I hereby appoint my said trustees to pay to the said Robert Smart whom
"failing to my said other heirs of entail in their order mentioned in the
"said deed the principal sums that shall be laid out for the purpose of an-
"swering the aforesaid annuities and declare that the same *shall be paid to*
"*him or them in the order aforesaid within six months after the deaths of the*
"*said annuitants respectively.*"

(*f*) Burnet, 17th Dec. 1736, M. 4274.—(*Clause.*) "Whatever money
"may be yet remaining over and above the fore-mentioned bequeathments let
"it be put out upon provision either here or in Scotland as shall be thought
"most convenient and the yearly provision of that money be given to my
"sister during her life and after her death let the stock be divided equally
"among my brother's children." Glendinning, 30th Nov. 1825, F. C.,
S. 4. 237. (*Clause.*)—"Item I appoint my said trustees to lend the sum of
"L.500 sterling on good heritable or personal security and to take the inte-
"rest thereof payable to Ann Sclater relict of James Spencer sometime my
"clerk or shopman during her life and the said sum itself *after her death* to
"the child or children lawfully procreated or to be procreated of her body
"share and share alike" &c. "Providing always that in the event of the
"death of the said Ann Sclater &c. without lawful issue the sums appointed
"to be liferented by them respectively shall return to and be upliftable by
"my said trustees and shall thenceforward be held by them and applied in
"the manner after directed with regard to the residue of my estate and
"to the sum for answering annuities." Buchanan, 12th Feb. 1830, F. C.,
"S. 8. 516. (*Clause.*)—"Declaring in like manner that upon the decease of
"the said Sibella Buchanan and John Macalister her husband or the longest
"liver of them I ordain and appoint the L.400 sterling liferented by them
"to be after their decease divided as follows—the sum of L.200 to be paid
"over to Lilias Buchanan my daughter spouse to Lieutenant John Greig
"of the royal navy or to the said John Greig himself his heirs or assignees
"in case his said spouse should not be in life at the time of the decease of

" the said Sibella Buchanan and her said husband and the remaining L.200 " sterling of the said sum of L.400 *after the decease of the saids Sibella* " *Buchanan and her husband* to be paid to Mary Buchanan my granddaughter " only child in life of the marriage that sometime subsisted betwixt Mary " Buchanan my daughter and the said Alexander Buchanan shipmaster in " New York *in the event there is no lawful issue of any of my other daughters* " *then in life but in the event of such issue* then the said sum of L.200 ster- " ling is to be equally divided betwixt them and the said Mary Buchanan " share and share alike and failing of the said Mary Buchanan my grand- " daughter and her issue and the issue of my other daughters before mar- " riage or majority then and in that case I appoint the said sum of L.200 " sterling to be paid away and delivered to the said Alexander Buchanan " her father and failing of him" &c. Mowbray, 9th July 1834, F. C., S. 12. 910, affd. S. and M'L. 2. 305.—The question arose under an appointment to pay or convey one-fourth part of the residue of the trust-estate to the testator's eldest daughter, and her heirs and assignees, and to settle and secure another fourth part thereof in favour of his second daughter Jean and her husband, and longest liver of them two in liferent, for the liferent use of the interest thereof only, and to the trustees themselves in fee, as trustees for the children of his said daughter Jean of *her present or any subsequent marriage, equally among them*, and failing of children, to and for behoof of the said Jean's other heirs or assignees. Findlater's Trustees, 6th Feb. 1835, F. C., S. 13. 422. *(Clause.)*—" Upon the decease of the longest liver of me and " my said spouse the said trustees shall" (after deducting certain legacies) " pay over the free yearly produce of my said estate heritable and move- " able to my children after mentioned" " declaring always that the sums " hereby directed to be paid to my said children shall be so paid over to " them respectively exclusive of the *jus mariti* of their present husbands " and of any other husband they may hereafter marry and the receipts and " discharges to be granted for the same to my said trustees shall be valid and " sufficient without the consent of her or their husbands and also declaring " that my said trustees shall dispone and convey the free residue of my said " heritable and moveable estate *to the lawful children of such of my children* " *above named as shall happen to leave issue equally among them share and* " *share alike and that in fee* heritably and irredeemably it being my will that " the said residue shall belong to my grandchildren *equally among them in* " *capita share and share alike* and that my own children shall have a right " of liferent allenarly and failing there being lawful issue of my said chil- " dren," &c. Provan, 14th Jan. 1840, F. C.

(*g*) Leitch's Trs. 2d June 1826, F. C., S. 4. 659, affd. W. S. 3. 366. The subjects were destined to the granter's wife in liferent, " and after " her death or in case of her entering into another marriage after my " death then for behoof of the said George Leitch my brother and his heirs

" and assignees whomsoever in fee *in case he shall be in life at the time of the* " *death or second marriage of the said Elizabeth Ironside* and failing the said " George Leitch by decease before me *or prior to the decease or second mar-* " *riage of the said Elizabeth Ironside* then I appoint the said trustees to hold " the foresaid lands and others in trust for behoof of the said James Frisby " Leitch my nephew and his heirs and assignees whomsoever in fee *in case he* " *shall be in life at the death or second marriage of the said Elizabeth Ironside* " and failing the said James Frisby Leitch by decease before me or *prior to* " *the death or second marriage of the said Elizabeth Ironside* then I appoint the " said trustees to hold the foresaid lands and others in trust for behoof of " Andrew Leitch my nephew son of the said George Leitch " *(the above qualification omitted)* " whom failing for behoof of my sisters," &c. " And " immediately after the death or second marriage of the said Elizabeth Iron- " side," the trustees are appointed to convey to the above parties in their order, in the terms above expressed.

(*h*) Porterfield's Trustee, 16th Dec. 1836, F. C., D. 15. 275, and House of Lords, July 1839, S. and M'L. 4. 685. This was a very special case. See Lord Moncreiff's note, and speech of Lord Chancellor Cottenham, and auth. cited.

(*i*) Clelland, 18th June 1839, F. C., D. B. M. 1. 1031.

(*k*) Wilkies, 27th Jan. 1837, F. C., D. 15. 430. (*Clause.*)—" I appoint " my said trustees as soon after the sale of the said lands as possible to divide " the free surplus and residue thereof among all my children then in life or " their issue *per stirpes* equally share and share alike the share of the pre- " deceasers without issue always accrescing to the survivors equally but the " shares falling to each of my said children as aforesaid *shall not be liable to* " *be affected or attached by their debts or deeds while in the hands of my said* " *trustees* and shall only be liable to such contingencies after the same is " actually paid over to them and discharged."

(*l*) Thorburn's Trs. 16th Feb. 1836, F. C., D. 14. 458. (*Clause.*)—" I " hereby appoint my said trustees and my foresaids as soon after my death as " may be thought most prudent and expedient to separate and divide the re- " mainder of my means and estate into nine equal shares and to allocate the " same among " (the testator's brothers and sisters) " equally and propor- " tionally among them my said brothers and sisters share and share alike " declaring hereby that the shares so provided and allocated to each of my " said brothers shall be delivered and paid over to them as soon as my " means and estate shall be converted into cash or otherwise brought into " such a situation as to enable my said trustees and their foresaids to make " a general division." It was also declared, " In case any of my said brothers " and sisters *shall die before me or before the foresaid period of division* with- " out leaving any lawful child or children or if the children of any of my " said brothers or sisters so predeceasing shall die without leaving lawful

"issue before attaining the age of twenty-one years it is hereby declared "that the share or shares allocated to my said brothers and sisters and their "children so deceasing shall again accrue and be added to the general fund "of division hereby conveyed in trust and shall be divided among my sur-"viving brothers and sisters share and share alike and in case of their "death among their children equally according to the rule and under the "conditions particularly before and after laid down." See note of Lord Corehouse.

(*m*) Stevenson, 30th June 1826, S. 4. 776.

(*n*) Lord Jeffrey, in Brockie, as in (*b*); Lord Corehouse, in Mure's Trs. as in (*a*).

(*o*) Dunbar's Trs. 13th Nov. 1805, Bar. Hume, 265.

(*p*) Leitch's Trs. as in (*g*).

(*q*) Duncan's Trustees, (or Tait,) 11th July 1837, F. C., D. 15. 1273.

(*r*) See references in (*m*).

(*s*) See Mowbray, as in (*h*), Forbes, 26th Jan. 1838, F. C., D.

56. EFFECT OF PROVISION OF INTEREST.—A legacy does not vest by force merely of a declaration that interest shall run from the testator's death, or any other specified term. Such is regarded as a separate bequest (*a*). For example, it is customary in legacies and provisions to children, payable at majority or marriage, to declare that interest shall be due annually prior to the period when the principal is to vest (*b*).

(*a*) See Johnston, 28th June 1831, F. C., S. 9. 806.

(*b*) See Omey, 19th Nov. 1788, M. 6340; Home, 28th Jan. 1807, Bar. Hume, 530.

57. PAYMENT PRIOR TO VESTING.—The anomalous case has occasionally occurred of beneficiaries being held to have a right to payment of their provisions prior to the admitted term of vesting. Where a father, in a trust-settlement, provided certain sums to his children in liferent, and to their issue, on the occurrence of the event of the majority of the youngest child of the annuitants respectively, in fee, with certain substitutions, it was held, in a question between the children of a daughter who had

reached the age of forty-four, and whose youngest child in existence had arrived at majority, (with the concurrence of their mother, as liferentrix,) and the grandfather's trustees, that the beneficiaries were entitled to immediate payment, subject to their mother's liferent, on finding caution to repay such proportion of the family provision as would belong to children afterwards born of the mother in her existing or any future marriage (*a*). Here the strict rule of law was thus made to bend to the obvious interest of children who had all attained majority, in circumstances where the birth of other children, or the decease of all the existing children, was in the highest degree improbable.

(*a*) Scheniman, 25th June 1828, F. C., S. 6. 1019; and case of Wright's Trustees *v.* Shaw, referred to in App. F. C., and S. 6. 1149.

58. LEGACIES, WHEN TRANSMISSIBLE?—(1.) To enable an heir or assignee to take as in right of the legatee, it is plainly necessary that the legacy should have become his absolute property. Thus, under a destination to *B.*, *and his heirs and assignees*, his heirs take on his predecease, not as such, but as conditional institutes under the testament; and they cannot be excluded by an assignation in favour of another; for as assignees necessarily derive their right from the cedent, they can acquire none until he himself has become proprietor of the subject (*a*). And the rule holds, although the testator should have given special power to the legatee to leave and bequeath the legacy to the exclusion of his heirs at law; for the power to name an heir of provision does not accrue until the legacy has vested; and thus the condition on which a legatee's heirs-at-law take, in virtue of a destination as above expressed, is purified as well by want of power as by want of will to make a settlement (*b*). (2.) For all the purposes of transmissibility, a power of disposal is, after the period when it takes effect, plainly equivalent to the vesting of an absolute

right of fee. (3.) But it is not essential to the validity of an assignation, that it should bear date after the term at which the legacy becomes vested; and a *mortis causa* conveyance will carry even a future legacy, provided it has vested during the granter's lifetime. A testamentary and revocable deed is regarded as the *ultima voluntas testatoris*, —as approved and confirmed down to the last hour that he is of a disposing mind. Thus, where A., by general disposition, conveyed her whole estate to B., and C. afterwards bequeathed to A. a liferent annuity, and conferred on her the power of disposing of the capital sum, *by will or deed under her hand*, which C.'s trustees were accordingly directed to implement, the sum was held to be carried by A.'s prior general conveyance, when it took effect on her death (*c*).

(*a*) Burden, 27th April 1738, Elch. *Mutual Contract*, 7, as reversed, Craigie and Stewart, 214; Graham, 17th Feb. 1807, M. App. *Legacy*, No. 3; Bedwells, 2d Dec. 1819, F. C.; Lawsons, 24th Jan. 1826, F. C., S. 4. 384, affirmed, W. S. 2. 625.

(*b*) Henry, 19th Feb. 1824, F. C., S. 2. 725.

(*c*) Hyslop, 11th Feb. 1834, F. C., S. 12. 413. See Smith, 17th Feb. 1836, D. 14. 502.

59. EFFECTS OF THE LAPSING OF LEGACIES.—(1.) As it is essential to the vesting of a legacy that there should be a legatee, it follows, that it falls or lapses on the failure of the institute and the postponed parties, prior to the period at which, by the testator's will, the legacy is to take effect. The same result is produced by the omission of a party, on whom is conferred the power of giving or withholding a legacy at his discretion, to make payment of it to the person thus contingently favoured (*a*). (2.) But although a legacy may not, to all intents and purposes, have vested in the favoured person, it does not always follow that it has lapsed. For example, the vesting of a legacy may be suspended by a condition, so as to be intransmissible un-

less the condition be purified during the lifetime of the legatee, although it does not lapse in the meantime (*b*). (3.) The effect of the lapsing of a legacy is not necessarily to give the sum or subject to the testator's heirs *in mobilibus*. Such will be the result when the executor, whether by provision or at law, has the ultimate interest; but where a residuary bequest has been made, a lapsed legacy belongs to the party ultimately benefited, as part of the residue. On the same principle, if the settlement is total in favour of certain parties in specified shares, the lapsing of the shares of one or more benefits the survivors. For as the presumption maintains, that had the testator contemplated the death of any of the favoured parties, he would have added their shares to the shares of the survivors, the law supplies the declaration omitted by the testator (*c*).

(*a*) Burnsides, 10th June 1829, S. 7. 735.

(*b*) Burden *v.* Smith, in House of Lords, 27th April 1738, Cr. and St. 214; Lord Glenlee, in Buchanan, 12th Feb. 1830, F. C., S. 8. 516.

(*c*) E. of Moray, 15th Dec. 1782, M. 8103. Here the special legatee was also residuary legatee; Arbuthnot, 7th June 1816, Bar. Hume, 274, in note to case of Robertson; Robertson, 10th Dec. 1819, Bar. Hume, 273. Here the intention was obvious, as the parties were mutually substituted to each other in the event of predecease before majority or marriage.

60. FORMS OF THE TESTAMENT.—Testamentary deeds are in the form either of a will or testament properly so called, of a trust-disposition and settlement, or a general disposition. The first is ordinarily employed to give legacies to several parties, which are to be payable absolutely on the testator's death, or at any future certain term; the second, when there is to be a course of management for the behoof of successive parties; and the last, for conveying the *universitas* of the moveable estate to a single individual.

## TITLE II. LAST WILL AND TESTAMENT.

61. CLAUSES OF THE DEED.—The deed consists of the following clauses: 1. *The inductive.* 2. *Appointment of an executor or executors.* 3. *Instruction to pay legacies as expressed, and account for the residue.* 4. *Clause of registration.* 5. *Testing clause.*

62. INDUCTIVE CLAUSE (*a*).—1. *Who can make a testament.*—The general rule (subject to certain restrictions in relation to particular portions of the moveable estate) maintains, as laid down by Erskine, that all who are capable of consent may make a testament, or grant legacies, if they are not disabled by special statute or custom; even minors without consent of their curators; wives without the authority of their husbands; and persons interdicted without the authority of their interdictors (*b*).

2. *Capacity to execute* (*c*).—The state of mind of a person desirous of making a will ought to be especially in the view of the practical conveyancer, although it is manifest that no general rules on this subject can be laid down for his guidance. But although each case must necessarily depend, in a great measure, on its own circumstances, a few leading results may be deduced from the authorities. (1.) The capacity required for making a testament is of a lower degree than in transactions which depend on considerations of the value of property, or implying present arrangements. When the testator is free from influence, it is sufficient that he is able to give, and voluntarily imparts to the man of business, clear directions for the disposal of his estate. (2.) Bodily weakness, unaccompanied with mental imbecility, is plainly no ground of incapacity; and failure of memory, although in some degree implying weakness of judgment, is not in

itself a sufficient indication of incapacity, when the testator comprehends the effect of his present acts. (3.) The testator must not only be capable of understanding the effect of each particular direction, when embodied in a written form, and presented to his notice; but, in point of fact, his attention must be called to the several particulars of the written deed. The manner, however, in which this shall be done necessarily depends upon the testator's state of body and mind. A party, in the full exercise of his powers, may place implicit confidence in his agent; whereas, in the case of sickness or weakness of intellect, it behoves the conveyancer to exercise the greatest caution in obtaining an approval of the terms of the deed, even where there are no grounds for supposing that the party is verging on absolute incapacity; and for this purpose it ought to be carefully read over to the testator. But it does not appear that the reading over is necessary, *de solemnitate*, at the time of the execution of the deed, although this is a convenient mode of preserving evidence of the fact. (4.) The Court have viewed with much jealousy any interference with the power of revocation, and regarded, as a test of intention, carried down to the latest period of mental capacity, that a testator should clearly comprehend that this faculty is at his absolute command (*d*). (5.) Where the capacity of a testator is doubtful, the rationality of the deed may form an important element in judging of its validity. Thus, a settlement in favour of strangers, when there is no adequate motive for preferring them to the testator's relations, is unfavourably regarded; but the alteration of a testament, deliberately executed by the testator when in *liege poustie* in favour of a stranger, obtained for behoof of the true heir by "ghostly counsel on deathbed," has been reprobated.

3. *Designation of the granter.*—The granter of the deed, called the *testator*, ought to be described by name,

surname, profession and residence, or at least by such distinctive marks as to leave no room for doubting his identity; for although a deed found in the repositories of one lately dead, commencing with his name and surname only, and closed with his ordinary subscription, may, in favourable circumstances, be presumed to be the deed of the person in whose custody it thus remained, it is the duty of the conveyancer to exclude all questions of this nature by the full and formal designation of the testator.

(*a*) I, A., being desirous to provide for the collection and disposal of my moveable estate after my death.

(*b*) Ersk. 3. 9. 15. *et seq.*

(*c*) See, on the subject of this Art. Young, Feb. 1638, M. 15,929; Arbuthnot, 4th Dec. 1694, ib.; Petrie, 15th Nov. 1735, M. 15,941, Elch. *Testament*, 3; Robertson, 15th Dec. 1742, M. 15,942; Innes, 12th Dec. 1740, M. 15,942, Elch. *Testament*, 5; Tulloch, 26th Jan. 1759, M. 11,672; Scot, 17th Nov. 1789, M. 4964; Towart, 16th May 1817, Dow, 5. 231; White, 20th June 1823, S. (Ap.) 1. 472; Gillespie, 11th Feb. 1817, F. C.; Watson, 18th Nov. 1825, S. 4. 200, affd. W. S. 2. 648; Campbell, 14th March 1827, Mur. 4. 179; Hogg, 8th March 1828, Mur. 4. 449; Anderson, 12th Nov. 1836, F. C. (Jury Sittings.) See Lord Cockburn's charge to the jury.

(*d*) Buchanan, 4th Nov. 1704, M. 15,932.

63. Appointment of executor (*a*).—(1.) This clause is not an essential, although a usual part of the deed; (above, § 48). In the event of no appointment being made, the office is supplied by law. (2.) An executor-nominate is substantially a trustee for the benefit of the legatees and all others interested in the succession, with powers of recovery and division; and until division is made, the estate is vested in him in trust (*b*). Thus, without an express appointment as trustee, the executor substantially bears that character, with all the powers necessary for extricating the will and the purposes of the testator. (3.) The executor is entitled by statute to a

third of the dead's part after payment of the testator's debts, amongst which are ranked the legacies and provisions for payment of which his appointment has been made, including such as may have been bequeathed to himself; and if the latter amount to or exceed the third, the executor has right only to the legacies (*c*).

(*a*) Do hereby make, constitute and appoint B. to be my sole executor and administrator, with full power to him to intromit with my moveable estate and executry of every description, to give up inventories thereof, to confirm the same, and generally to do every thing in the premises competent to an executor; declaring always, that the said B. shall be accountable to the residuary legatee herein after named for his intromissions in virtue hereof after payment of all my lawful debts, deathbed and funeral charges, the necessary expenses to be laid out in confirming and recovering my said means and estate, and the legacies herein-after appointed to be paid.

(*b*) Ersk. 3. 9. 5; Soutray, 13th July 1670, M. 15,927; Kemp, 2d March 1802, M. 16,949.

(*c*) 1617, c. 14, above, p. 98; Mackenzie, 3. 9. 11, and Observ. 350; Stair, 3. 8. 53; Bankton, 3. 8. 4; Ersk. 3. 9. 26; Moncreiff, 27th Jan. 1636, B. S. 1. 371; Nasmyth, 17th Feb. 1819, F. C. In this case the executors were held to have a valid claim under the statute.

64. INSTRUCTION TO PAY LEGACIES AND RESIDUE (*a*).—1. *Terms for expressing a legacy.*—(1.) It is a rule of the civil law, incorporated into ours, that *falsa demonstratio non vitiat legatum.* Thus a specific sum, although described as the residue of a particular fund which may not yield so much, is still payable in full, unless it is otherwise expressed (*b*). But when the legacy is special—of a particular subject, or of a sum as contained in a particular voucher of debt, or in the hands of a certain individual, as the legatee has the benefit of the rule of law which gives a special legatee right to the particular subject or sum bequeathed; so, on the other hand, the destination of the subject or loss of the sum otherwise than through the fault or negligence of the executor, or even its payment voluntarily obtained by the testator, which alters the cha-

racter of special by making the particular description no longer applicable, extinguishes all right in the legatee (*c*). Payment to the testator himself of a sum thus situated, bequeathed as a special legacy, has uniformly been regarded *inter modos adimendi legata* (*d*). (2.) Terms must be used which comprehend the sum or subject intended to be given. (See *Universal Legatee.*) But in the common form of the will, where particular subjects or specified sums are bequeathed, difficulty in the description can seldom occur. (3.) Terms occurring in the body of a testament, by which a legacy is effectually bequeathed, are not controlled by a marginal reference stating it at a smaller amount (*e*).

2. *Burdens on legacies.*—A special legacy may be affected with the burden of a sum of money in favour of another, declared either in the same or in a future deed; but a special legacy, duly constituted and not recalled, cannot be diminished by a general legacy to another, unless the burden be expressly imposed on the special legatee (*f*).

3. *Legacy to a wife or child.*—Questions regarding bequests to those near relations who enjoy the legal claims of *jus relictæ* and *legitim*, which cannot be defeated by the father by means of a *mortis causa* settlement, depend mainly on circumstances, and therefore the intention ought to be clearly expressed. (1.) When the legacy is by way of a particular provision, the presumption is in favour of the widow or child having right to it over and above the legal provision, since otherwise the bequest would be inoperative (*g*). The result thus depends on presumed intention; and where this does not operate, a child cannot claim both the provision and the legacy (*h*). (2.) Where, on the other hand, the provision is a share of the whole estate in a total settlement, it is plainly incompatible with the legal claim: hence, in these circum-

stances, the favoured party is put to his election, and if he repudiate the settlement by claiming *legitim*, his right to the voluntary provision is held to be abandoned (*i*). (3.) But the repudiation of a liferent provision thus voluntarily bequeathed does not affect the right of the legatee's children, to whom the fee has been destined (*k*).

4. *Legacy to a debtor or creditor.*—(1.) A bequest to a debtor of the discharge of his debt is called *legatum liberationis*. All that is necessary is to express in clear words either a general discharge of all claims, or a discharge of the particular debt (*l*). The latter is the more eligible course; for it has been held that sums not forming a proper debt against the legatee, but coming into his hands on the testator's account, although known to the testator to have done so, were not comprehended under a general discharge of *every thing the legatee might owe him at his death* (*m*). (2.) A legacy to one who is debtor to the testator will be compensated in whole or in part by the debt; and the only inquiry is, whether a debt be due (*n*). (3.) On the other hand, when the testator is the debtor, care is necessary in expressing his intention, whether to give a legacy to the creditor, or merely to acknowledge the debt and direct its payment by the executor. The presumption seems to be in favour of a donation; for although the maxim, *donatio non præsumitur*, maintains in ordinary transactions between debtor and creditor, a testament is the recognised form for conferring *mortis causa* donations. In the absence, therefore, of a declaration that the legacy shall be imputed in payment of the debt, it would appear that both are due (*o*).

5. *Double legacy.*—Where a testator has, in words, bequeathed more than one legacy to the same individual, whether in the same or separate deeds, the intention to give two sums, or only one sum, must, in the absence of clear words, be gathered from the tenor of the deeds.

The rule of the civil law has been adopted, by which, if legacies, although of the same amount, are left in different deeds, or if, in the same deed, two legacies are bequeathed with any variation in time, quality or condition, both are due (*p*). Hence the practical rule is deducible, to employ terms which exclude all question.

6. *Terms for describing a legatee.*—(1.) Although, as a general rule, the description of the legatee is sustained, *si constet de persona*, (above, § 50), it is plainly the duty of the conveyancer to express the full name and designation, if this can be done. When a sum is bequeathed to *each of the children of a marriage*, these or equivalent terms will sufficiently connect the legacy with each individual legatee; and although care should be taken to avoid the use of terms which have a tendency to control the connecting words, a mere blunder in estimating the sum to which legacies to the individuals of a family or class amount in whole will not invalidate the bequest (*q*). The terms, *lawful heirs of A. B.*, are descriptive of the children alive at the testator's death, the period at which a legacy absolutely vests, where there is no legal uncertainty in the description of the legatee; and a provision to *the children of a marriage, exclusive of the heir entitled to succeed*, comprehends all the children alive at the period of vesting, except the eldest son, who, although that period should arrive during the lifetime of the father, is denied a share, as being heir-expectant (*r*). (2.) In one instance, the legacy being clearly expressed, but the name of the legatee omitted through the mistake of the writer, the Court allowed a proof by witnesses, to establish that a particular memorandum alleged to contain it had been taken down from the testator's dictation, and formed the only instructions for preparing the testament (*s*). The result of the proof does not however appear. But it is undoubtedly competent to supply the name of a legatee, by reference to

another deed, although in the English form (*t*). (3.) The same rules hold when sums of money are placed *in arbitrio tertii*, at the disposal of another; (above, § 50). The person to whom the power is given must be clearly pointed out.

7. *Destination to heirs.*—(1.) Reference is made to § 50, *et seq.* and § 58, in regard to the effect of a destination to heirs. (2.) As a legacy is in the ordinary case personal to the legatee, it is thus of importance to mention heirs, when it is intended that it shall not lapse by the legatee predeceasing the testator. The words of style are, *heirs, executors and assignees*, of which *heirs* is the essential word. Executors, as heirs *in mobilibus*, are embraced by that term (*u*); and assignation is ineffectual prior to the vesting of the legacy; (above, § 58); after which it becomes transmissible without a special power to that effect. (See *Assignation.*) (3.) *Heirs whomsoever* and *heirs-at-law* are synonymous with *heirs;* and these terms, when unqualified, plainly embrace successors by the destination of law, however remote; but when used in a testamentary deed, their meaning is flexible, and may, by clear indication of intention, be restricted to *heirs of the body* (*v*). (4.) It is a practical rule to add the term *heirs* after each individual legatee, when heirs are intended to be favoured on the failure of the legatee; and it would appear that a general destination to heirs is not to be relied on (*w*).

8. *Payments to legatees by the testator.*—Legacies are not discharged by sums paid by the testator during his life, which are presumed to be donations, unless the contrary intention be expressed, or manifest from the whole circumstances of the transaction. Questions as to payment by anticipation are most frequent among relations, and being circumstantial, no general rule can be given for their solution (*x*).

9. *Payment by executor.*—(1.) Legacies, whether

special or general, are burdens only on the dead's part, (above, § 49,) or that portion of the free estate which is by law at the disposal of the testator by *mortis causa* deed. Thus, where the testator leaves a widow and children, who take their legal provisions, the subject for the payment of legacies is a third of the free succession, and where he leaves either a widow or children, a half. Debts include provisions to children, whether by marriage-contract or bond, and deeds of donation to the wife made and delivered in *liege poustie* (*y*). Nor can the moveable estate be relieved of the burden of debts or provisions to children, by imposing them on the heritage, in a testament, which is in law a deathbed deed; although a power to burden lands conveyed to a stranger disponee, duly reserved in the conveyance, as it may competently be exercised on deathbed, is effectual in a testament, which is legal evidence of the testator's will (*z*). (2.) When no term is appointed, legacies are due at and bear interest from the instant of the testator's death, although the executor cannot be compelled to make payment until the expiry of a further period of six months (*aa*); and where the executor takes the risk of making payment of legacies before settling with the defunct's creditors, it has been held that the responsibility is solely on him, and that the legatees are safe, provided enough remains in the hands of the executor, for the payment of debts. But so long as legacies are unpaid, debts are preferable (*bb*). (3.) The executor, as a trustee for all concerned, must secure the rights of those to whom legacies are not directly payable. Thus, where a legacy is bequeathed in fee and liferent, although the executor may safely pay on the joint discharge of the favoured parties (*cc*), it is plain that he is not warranted to hand over the capital sum to the fiar. In the case, likewise, of a legacy burdened with a yearly payment to another, the executor (when the legacy is not special) will be bound

to protect the interest of the legatee of such annuity, unless the latter shall accept the principal legatee as his debtor (*dd*). (4.) As there is no room for competition between legacies of sums of money, and those of subjects or debts particularly pointed out, and thus expressly conveyed, *special* legacies are preferable to general, and may indeed be directly recovered from the debtor or possessor, the executor being made a party to the process. And as a consequence of this right in the special subject or debt, its loss or diminution is at the risk of the legatee (*ee*). (5.) *General* legacies again suffer a proportional abatement, when the fund for their payment is insufficient (*ff*); but there is an exception of legacies declared or manifestly intended to be preferably payable, which thus partake of the nature of special, as being left for a special purpose. Thus, one to whom a sum was bequeathed for the purchase of mournings, was preferred to a part of it, as the probable price of the suit (*gg*).

(*a*) And I ordain my said executor to pay and deliver the following legacies to the persons after named and designed, viz. (*legacies specified.*) And whatever residue there may be of my said means and estate falling under this testament, I ordain the same to be accounted for and paid over to C., whom I hereby appoint to be my residuary legatee.

(*b*) Arbuthnot, 13th Feb. 1756, M. 8080.

(*c*) Ersk. 3. 8. 11. 12.

(*d*) Paip, 19th Dec. 1694, B. S. 4. 228; Blair, 9th Feb. 1742, B. S. 5. 718; Jack, 27th July 1742, M. 11,357; Pagan, 26th Jan. 1838, F. C., and D. See authorities, both Scotch and English, referred to. See, on Ademption of legacies, Bell, Pr. 1876, and auth. cited.

(*e*) Bogle, 28th Feb. 1815, F. C., Bar. Hume, 274.

(*f*) Trails, 21st July 1676, M. 8056; Wauchop, 3d July 1724, M. 8063.

(*g*) Howden, 18th May 1821, S. 1. 18; Clark, 16th May 1823, S. 2. 313; Dundas, 12th June 1827, S. 5. 790; Smith, 10th June 1829, S. 7. 734; Macdowall, 10th July 1833, S. 11. 925. See Henderson, 26th July 1782, M. 8191; Stewart, 29th Nov. 1832, S. 11. 139; Collier, 6th July 1833, S. 11. 912; Macintosh's Trs. 7th Dec. 1838, F. C., D. B. M. 1. 181.

(*h*) See Nasmyth's Trs. 19th Dec. 1833, F. C., S. 12. 243.

(*i*) Henderson, Collier, as in (*g*).

(*k*) Fisher, 24th Nov. 1831, F. C., S. 10. 55; Collier, as in (*g*).

(*l*) See Norval, 17th Jan. 1764, M. 12,290-2.

(*m*) Graham, 22d June 1792, M. 8108. The testator bequeathed to his brother, sisters, uncle and cousins, "a free discharge of every thing they "may owe him at his death."

(*n*) See Reid, 17th June 1823, S. 2. 408; and in House of Lords, 6th May 1825, W. S. 1. 172.

(*o*) Gala, 14th June 1764, B. S. 5. 898; Arrol, 5th July 1822, S. 1. (Ap.) 164. See Hunter, 26th Nov. 1836, D. 15. 159.

(*p*) Stuart, 24th July 1623, M. 11,439; Stirling, M. 11,442; M'Intyre, 1st March 1821, F. C.; Elliot, 27th Feb. 1823, F. C., S. 2. 250, and auth. cited; Lindsay, 6th Feb. 1827, S. 5. 297; Gillespie, 22d Dec. 1831, S. 10. 174.

(*q*) Bogle, as in (*e*). The summation was on the margin of the deed, and does not appear to have been holograph.

(*r*) Pearson, 28th June 1825, S. 4. 119; Clarke, 18th Dec. 1832, S. 11. 220.

(*s*) Pollock, 27th Feb. 1777, M. 8098, and App. *Legacy*, No. 1.

(*t*) Henderson, 18th Jan. 1803, M. 15,953. The deed contained a destination of heritage, and was ineffectual according to the law of Scotland; but reference to it was allowed for supplying the names of the legatees, who were the members of the destination.

(*u*) Ersk. 2. 2. 3. 11.

(*v*) Ersk. 3. 8. 47; Hunter, &c. 14th Nov. 1839, F. C. and auth. cited.

(*w*) See Paterson, 4th June 1741, M. 8070.

(*x*) Stirling, 20th June 1704, M. 11,442; Watsons, 16th Nov. 1831, F. C., S. 10. 12. See Mollison, 22d Feb. 1822, S. 1. 346, and S. (Ap.) 2. 445; Cairns, 11th March 1829, S. 7. 571; Hume, 26th Nov. 1834, S. 13. 90; Robertson, 15th Feb. 1838, F. C., and D.

(*y*) Ersk. 3. 9. 22.

(*z*) Davidson, 19th Feb. 1755, B. S. 5. 289; Govan, 28th Jan. 1812, F. C.

(*aa*) A. S. 28th Feb. 1662; Ersk. 3. 9. 45, 46; Bell, Pr. 1880, and auth. cited.

(*bb*) Ersk. 3. 9. 46, and note by Ivory, 649; Robertson, 29th July 1760, M. 8087; Wallace, 16th May 1821, F. C. See More's Trs. 24th Jan. 1835, S. 13. 313.

(*cc*) Nisbet, 27th June 1809, F. C.

(*dd*) See Wauchop, 3d July 1724, M. 8063.

(*ee*) Ersk. 3. 9. 11, 12, and auth. cited; Bell, Pr. 1875; Wauchop, 3d

July 1724, M. 8063. See Pagan, as in (*d*). See also Balmerino, 18th Dec. 1746, M. 8074, from which Mr Bell (Pr., as above,) deduces the rule, that creditors who take in preference to a special legatee must assign their debts to him. But creditors can have no interest to interfere with a special legatee, when there is more than enough for the payment of debts; and if no surplus exist, the assignation would be inoperative. The circumstances of this case were very special, the articles given as special legacies having been sold before the deeds giving the legatee a right to them had transpired.

(*ff*) Ersk. as in (*ee*). See Hagart, 14th Nov. 1834, S. 13. 35; Currie, 22d Jan. 1835, S. 13. 290.

(*gg*) Ersk. 3. 9. 12.

65. LEGACY TO SEVERAL LEGATEES.—1. *Jus accrescendi.*—Terms for expressing a bequest to more than one individual ought to be carefully chosen. (1.) In a legacy, or liferent of a legacy to A. and B., or to A. and B. *jointly*, or *jointly* and *severally*, the *jus accrescendi* has place, and it belongs to the survivor (*a*). On the other hand, terms such as *equally and proportionably*, or *share and share alike*, which import an intention that the legacy shall be divided, exclude the *jus accrescendi*. It is plain, however, that under all these forms of bequest, the legacy falls to be equally divided between A. and B., if both survive the testator, inasmuch as it is impossible for each of two persons to enjoy it *in solidum*, and there are no terms for a preference of either (*b*). A legacy to A. and B. *severally* would probably follow the same rule. (2.) The terms, *to A. in liferent and B. in fee*, import a right in B. after A.'s death, and thus express an indefeasible substitution; but it is not essential to the vesting of the legacy that both should survive the testator. Either, on his survivance, will take the right conferred on himself (*c*). (3.) Bequests to parents and children follow the same rules with provisions in marriage-contracts. (See *Marriage-Contract*). (4.) In regard to destinations and substitutions of a more complicated nature, see above, § 51, *et seq.*

2. *Per capita or per stirpes.*—(1.) A legacy or provision to members of two or more families should be qualified by the terms *per capita*, (by heads, or as individuals,) or *per stirpes*, (by families,) according to the intention of the testator. (2.) When these or equivalent expressions are not found in the deed, the bequest is construed according to presumed intention, deduced from the terms in which it is conceived, or the whole scope of the settlement. Thus, a legacy to the *children of the testator's sisters, whom failing, their descendants*, has been held to import a division by families (*d*). Again, the words, *share and share alike*, or *in equal portions*, applied to the children of two or more individuals, have plainly the opposite meaning (*e*). Thus also a bequest to certain persons by name, and the children of another, is divisible *per capita* (*f*).

(*a*) Grieve *v.* Welsh, 23d Nov. 1838, F. C., D. B. M. 1. 94. The testator conveyed his whole estate "to and in favour of the said Angus Welsh "and Sarah Welsh" (his brother and sister) "in liferent during all the "days of their lives for their liferent use allenarly and on their decease to "the said Janet Smith" (daughter of Sarah Welsh) "also in liferent "during all the days of her life for her liferent use allenarly and to the "child or children who may be procreated of her body in fee." Angus Welsh, on his surviving Sarah Welsh and Janet Smith, was held entitled to the liferent of the whole.

(*b*) Paterson, 4th June 1741, M. 8070; Rose, 15th Jan. 1782, M. 8101; Torrie, 31st May 1832, F. C., S. 10. 597; Jurid. Styles, 2. 480, note §.

(*c*) Bell, Pr. 1879.

(*d*) Thomson, 16th Nov. 1814, F. C.

(*e*) Renny, 3d Dec. 1822, S. 2. 60; Grant, 22d May 1810, F. C. *(Clause.)*—"The remainder of my fortune I bequeath to James William "John and Margaret Grant the four orphan children of my eldest sister "Elizabeth by her husband the late Lieutenant Francis Grant; and the "children of my third sister Dolly by her husband Lieutenant James "Fyffe; that is to say whatever I may be worth at the time of my death "with the exception of the L.4000 sterling already disposed of as above "expressed is to be divided in equal portions by my said executors among "the children (or the survivors of them at the time of my decease) of my

"sister Elizabeth by her husband the late Francis Grant and the children "of my sister Dolly by her husband James Fyffe."

(*f*) M'Courtie, 15th Jan. 1812, Baron Hume, 270.

66. TERMS FOR CONSTITUTING A UNIVERSAL LEGATEE OR LEGATARY (*a*).—One to whom the whole succession is bequeathed, either for his own sole behoof or with the burden of legacies to others, is called *universal legatary*, and he is uniformly nominated executor in the deed. The terms used for expressing a universal legacy are extremely technical. (1.) Thus, *goods and gear; goods, gear and effects; goods and effects; moveable goods;* include only the *ipsa corpora* of moveables in the restricted signification of the term. Debts, whether due by bond or otherwise, called *jura incorporalia*, *jura crediti* and *nomina debitorum*, bankers' notes, and even coined money, are thus excepted. And it is obvious that the addition of particulars, falling within the generic description, such as household furnishing, insight plenishing, and the like, cannot make the terms more comprehensive (*b*). Such a specification may, on the contrary, under a well-known principle, qualify a comprehensive generic expression, such as *moveables*, which would otherwise carry the *universitas* (*c*). (2.) The clause, *All the furniture and moveables contained in a particular house or elsewhere*, has received a similar interpretation (*d*.) (3.) It is said that the term *moveables* includes heirship moveables; but the case relied on related to an assignation in a marriage-contract, a deed suited to the conveyance both of heritage and moveables (*e*); and the presumption would appear to be against the validity of a legacy of heritable subjects, although, when clearly expressed, such seems effectual to subject the executor in their value; (above, § 49. 3.) (4.) The term *furniture* seems to be exclusive of books, and is said not to comprehend wine (*f*), a wide exception if wine is to be taken in a generic sense. Doubts of this nature, expressed by high

authority, are enough, however, to render advisable either a specification or exception of the particular articles, as the circumstances may require, where the conveyance is not meant to be total. (5.) The proper terms for giving a general or universal legacy are thus, *goods, gear, debts and sums of money*; or *whole moveable estate*; and, when the amplification contained in the ordinary style is used, care must be taken that every particular be specified. The appointment of the executor as *universal legatary* has the same effect (*g*).

(*a*) Do hereby nominate and appoint B. to be my sole executor and universal legatary leaving and bequeathing to him the whole goods gear debts sums of money household furniture and in general the whole moveable means estate and effects whatsoever that may pertain and be resting owing to me at the time of my decease with the whole vouchers and instructions thereof and all that has followed or is competent to follow thereupon But always with and under the burden of all my just and lawful debts. See Jur. Styles, 2. 433-4.

(*b*) Ersk. 3. 9. 11; Oswald, 22d Nov. 1683, M. 5009; Henderson, 1st Dec. 1699, M. 5012. It would appear from Fountainhall's report that *goods and gear* were held to have a universal application; but the case related to a marriage-contract, and it has not been followed; Ker, 19th Feb. 1745, M. 2274; Johnston, 17th Nov. 1758, M. 11,364; Fraser, 9th July 1776, M. 2322; E. of Fife, 14th May 1795, M. 2325, Bell, 162, affirmed on appeal: the clause was in these terms: "To and in favour of my wife "Mrs Margaret Duff in case she shall happen to survive me and to her "heirs executors and assignees the whole moveable goods gear and effects "which shall belong to me at the time of my decease including heirship "moveables household furniture outsight and insight plenishing silver plate "jewels and linens and in general all moveable goods and effects of what-"ever kind and denomination that shall happen to belong to me at the time "of my death and that free of all debts and deductions whatever." Macnab, 30th May 1797, M. 2303.

(*c*) Dunbar's Trustees, 15th Jan. 1808, Baron Hume, 267.

(*d*) Ersk. 3. 9. 11; Cuningham, 18th Feb. 1737, M. 11,660; B. S. 5. 195; Elch. *Legacy*, 4: the common phrase, *lying money*, is here explained to mean gold and silver found in the repositories of a defunct.

(*e*) Bell, Pr. 1885; Ferguson, 8th Nov. 1682, B. S. 3. 435.

(*f*) Bell, as in (*e*).

(*g*) Jurid. Styles, 2. 433.

67. CLAUSE OF REGISTRATION.—The registration consented to is in the books of Council and Session, or others competent, and thus includes the courts of the Sheriffs, Commissaries, and Bailies of royal burghs. Those of the Commissaries are in practice principally used for the registration of wills.

68. REVOCATION.—(1.) The last will and testament, and, in general, every testamentary writing, being in its nature a gratuitous deed, to take effect after the death of the testator, and not sooner, is necessarily revocable without a reserved power to that effect (*a*); nor will the addition of a clause of warrandice make a testamentary writing irrevocable (*b*). The conveyance being of property which shall belong to the granter at the time of his death, is plainly insufficient, by its terms, to vest an immediate right, even although perfected in so far as such a deed can be perfected, by delivery or its equivalents, (*e.g.* registration,) or to exclude the effect of a future deed disposing of the subjects *de præsenti* (*c*). A testamentary deed is a proper deed of succession or provision, and is thus to be distinguished from a proper deed of obligation, which, although gratuitous, and not to be effectual until after the death of the granter, will, if delivered, be thenceforward incapable of recal (*d*). But an exception seems to maintain of *mortis causa* deeds duly perfected by delivery, proceeding on *pacta de successione viventis*, when granted for an onerous cause (*e*), and not containing a reserved power of revocation (*f*). (2.) Revocation may take place by destroying the testament itself, or any mark of its authenticity, such as the seal of an English will (*g*); by a clause in a subsequent deed, either generally revoking all former wills and testamentary dispositions, or specially revoking the particular testament or legacy; or by a conveyance of the subjects to another. It seems indeed to be unques-

tionable, that express revocation (although in practice employed) is superfluous; for the *latter will* controls all prior records of intention. The derogatory deed must, however, be probative according to the law of Scotland; and it is not enough that it bear the forms of the law of the testator's domicil when abroad (*h*). There are no essential technical words; but the intention must clearly appear, as *in dubio* the presumption is in favour of an existing deed. For example, a declaration in a subsequent deed, that a moveable subject *shall be considered as part of the testator's executry, and be regulated by the general law of moveables in its appropriation*, has been held not to take it out of the scope of a prior testament disposing of the whole estate (*i*). The question, whether a particular deed or writ amounts to a revocation, is thus plainly circumstantial (*k*). (3.) Revocation is competent only to the party or parties who made the deed; and unless the power to revoke is reserved to one of two parties to a mutual settlement of property at their joint disposal, it thus becomes irrevocable by the death of either (*l*).

(*a*) Ersk. 3. 9. 5, and note 569; Miller, 11th July 1826, S. 4. 822.

(*b*) Dougal, 25th Feb. 1789, M. 15,949. But a clause of warrandice is not necessarily equivalent to a declaration of irrevocability: it may be intended merely to give a preference to the favoured party in a question with others, after the deed has taken effect by the death of the testator; and therefore the question, whether an express renunciation of the power to revoke makes a *mortis causa* deed irrevocable appears to be still open. See Lord Fullerton's note in Duguid, as in (*d*).

(*c*) Somerville, 18th May 1819, F. C. See Leckie, 22d Nov. 1776, M. 11,581, where the distinction is shown between *mortis causa* and *de præsenti* deeds. The granter's moveable estate was conveyed as at death, and his heritage immediately, with a reserved liferent, and the deed perfected by registration. The conveyance of the heritage was held to be separate and independent, and to have been made irrevocable by the registration as equivalent to delivery; whereas that of the moveables was a mere settlement, and revocable as *mortis causa*. See the opinion of the Court in Somerville.

(d) See examples of a gratuitous deed of this description in Leckie, as in (c); and Duguid, 29th June 1831, F. C., S. 9. 844.

(e) Curdy, 7th Dec. 1775, M. 15,946.

(f) Balders, 22d Dec. 1814, F. C.

(g) Nasmyth, 7th Jan. 1817; reversed, 27th July 1821, S. (Ap.) 1. 65.

(h) Fordyce, 5th July 1827, S. 5. 897; Brack, 23d Nov. 1827, S. 6. 113, affd. W. S. 5. 61, and auth. cited.

(i) Ersk. as in (a); Doves, 31st May 1827, S. 5. 734.

(k) See Bell, Pr. 1864, and auth. cited; Buchanan, 4th Nov. 1704, M. 15,932; Munro, &c. 3d July 1813, Dow, 1. 437; Howden, 8th July 1815, F. C.; Doves, as in (i); Speirs, 18th Dec. 1829, S. 8. 268; Barclay, 4th March 1830, S. 8. 632; Jeffrey, 11th Feb. 1831, S. 9. 423.

(l) Nicolson, 16th Dec. 1806, M. App. *Legacy*, No. 2; Anderson, 27th Jan. 1837, F. C., D. 15. 435.

69. TESTING CLAUSE.—1. *Testaments, how far excepted from the ordinary rules of attestation.*—The general rules on the subject of the authentication of writs are explained in the author's Feudal Conveyancing. (1.) Writs of a testamentary nature are usually thought to be in some measure privileged as regards the forms of attestation; but the exception appears, on examination, to be very limited in its scope. The greater number of the decided cases relate to testaments holograph of the testator, in whole or in the essential parts (a); and there seems no reason for holding that informal testamentary writings, not possessing the favoured character of holograph, are exceptions from the general rules of law, unless in the single case of military testaments made abroad, where there is necessarily *penuria peritorum* (b). To deny effect to these, when informal, would in most cases be to exclude soldiers and sailors on active service from the common privilege of settling their affairs by will—an evil greater than can possibly flow from an exception limited to persons living in a temporary and artificial state of society. (2.) It has been ruled, that the testaments of persons who cannot write, relating to moveable property of the greatest amount or value, may be executed by means of one notary and two witnesses (c),

—a determination resulting from the words of the statute of 1579 (*d*), which are interpreted to refer only to deeds of importance *inter vivos*, relating to moveables, and deeds affecting heritage (*e*); so that the prior statute of 1540 (*f*) must regulate the case of testamentary writs in as far as they relate to moveables. But deeds of importance, (*i. e.* deeds whereof the subject-matter exceeds in value L.100 Scots, estimated with reference to the obligant,) not in the form of a testament, although intended to convey legacies, seem to fall within the ordinary rules, and thus to require two notaries and four witnesses for their attestation by those who cannot write (*g*).

2. *Codicils.*—(1.) A codicil must, in the general case, be attested with the usual formalities; and although reference in a will to a separate writing, such as *a letter signed by the testatrix of the same date*, has in one instance been held to exclude objection on the part of the residuary legatee, to a legacy bequeathed by a letter admittedly signed by, although not holograph of the testatrix, the case must be regarded as in no inconsiderable degree involved in specialties (*h*). (2.) The mention in a testament of a *writing under my hand*, to be afterwards executed by the testator, is held to refer to a probative writ (*i*).

3. *Is subscription in all cases essential?*—(1.) In the ordinary case, the subscription of the testator is a necessary part of the authentication of the writ, whether a testament or codicil, and whether holograph or written by another. For, even in writings in the testator's hand, subscription is necessary to show that the document is a completed writ, by which the party intends that he shall be bound: so long, therefore, as the writing remains unsigned, the testator is at liberty to resile, and he is held to resile accordingly by leaving it unsubscribed at his death (*k*). (2.) But although subscription is the rule, there are instances, depending on favourable circumstances, where codicils,

ological of the testator, have been sustained, as brought within the scope of intention, by being written upon or referred to in other authentic deeds, and having generally had the testator's name in some part of the writing (*l*). (3.) It is almost unnecessary to add, that all such cases, as depending on circumstances, are fallacious, and not to be relied on in practice.

4. *Testing clause unnecessary in holograph testaments.*—The bare subscription of the party to a holograph will is sufficient without a testing clause (*m*).

5. *Time of inserting the testing clause.*—Much latitude has been allowed in the filling up of the testing clause in deeds. The only limit seems to be, that it must be inserted prior to the production of the deed judicially or for registration, and that a future correction of an error in the testing clause is incompetent. This has been specially held in regard to a settlement (*n*).

(*a*) Maxwell, 1583, B. S. 1. 119; Pennycuik, 20th Jan. 1709, M. 16,970. Wilson, 22d Dec. 1803, Bar. Hume, 882.

(*b*) Kerr, 1st Jan. 1708, M. 16,968; Crichton, 12th Jan. 1802, M. 15,952, 17,059; Dundas, 13th May 1807, M. App. *Writ*, No. 6.

(*c*) Bog, 16th Jan. 1623, M. 16,960; Stoddart, 18th Dec. 1799, M. 16,857; Trail, 26th Feb. 1805, M. 15,955. Parochial ministers in their own, or in other parishes in the absence of the clergyman, may officiate as notaries; 1584, c. 133; Hepburn, 31st Jan. 1606, M. 16,827.

(*d*) 1579, c. 80.

(*e*) See the argument in Stoddart, as in (*c*).

(*f*) 1540, c. 1. 17.

(*g*) Wardlaw, 26th Jan. 1710, M. 7798, 16,959.

(*h*) Dundas, as in (*b*); Inglis and Buchan, 27th May 1828, F. C., S. 6. 864, as reversed, W. S. 5. 785. See also S. 10. 486 and 838.

(*i*) Gillespie, as in (*l*).

(*k*) 1540, c. 117; Stair, 4. 42. 6; Baird, 27th June 1839, F. C., D. B. M. 1. 912.

(*l*) Stair, as in (*k*); Wauchope, 15th July 1662; M. 16,965. Currence, June 1688, B. S. 2. 121; Gillespie, 21st Dec. 1831, F. C., S. 10. 174. See Baird, as in (*k*).

(m) Wilson as in (a).

(n) Brown, 11th March 1809, F. C.

70. CODICILS (a).—(1.) A codicil is a supplementary writ attached to a will or other testamentary deed, or bearing reference to it. There are no precise rules for the preparation of the formal parts of codicils, and the safe course for the conveyancer is to trust to the approved styles. (2.) Codicils are employed to give new legacies, or to alter, modify and revoke bequests already made. The terms for expressing legacies are similar to those employed in the principal deed. (See above, § 64.)

(a) Jurid. Styles, 2. 434.

## TITLE III. SPECIAL DISPOSITION AND SETTLEMENT OF MOVEABLES (a).

71. FORM AND EFFECT.—This deed, although intricate in its structure, has the precise effect and no more of the last will and testament, and is thus, in ordinary cases, of no advantage in practice. It contains a *de præsenti* conveyance, which is wholly unnecessary in a *mortis causa* deed relating to moveables only; and for the purpose of controlling the effect of the conveyance, a clause of reservation of the testator's liferent and a power of revocation are added. This form is appropriate only to a *mortis causa* conveyance of heritage, (see *General Disposition and Settlement,)* in which the insertion of dispositive words are required by technical rules. But where a testator wishes to avail himself of the privilege conferred by statute (b), of making a *special conveyance* of moveables, in order to supersede confirmation on the part of the disponee, the special disposition and settlement becomes a useful form of deed.

(a) Jurid. Styles, 2. 436.

(b) 1690, c. 26. *Anent the confirmation of testaments.* (*Excerpt.*)—And further their Majestys with consent foresaid DECLARE that where special assignations and dispositions are lawfully made by the defunct tho neither intimated nor made public in his lifetime they shall be yet good and valid rights and titles to possess bruik enjoy pursue or defend albeit the sums of money or goods therein contained be not confirmed without prejudice always to the competition of creditors and others and of their rights and diligences as formerly before the making hereof.

## TITLE IV. GENERAL DISPOSITION AND SETTLEMENT.

72. FORM AND PURPOSE.—The purpose of the general disposition and settlement is to make a total settlement of the testator's estate, both heritable and moveable, on a particular individual, under the burden of debts, legacies and provisions. This form of settlement is comparatively modern. At an early period it was a universally received maxim of our law, that heritage could not be transmitted by testament, founded, according to Craig, on the jealousy of intrusting persons in sickness and distress with the power of alienating their heritage to the prejudice of the heir (*a*), although, as we learn from Stair, it was extended to testamentary deeds made in *liege poustie* (*b*). Perhaps a valid reason can be found in the rule of the feudal law, which excluded the direct power of alienation; whence, as heritage could not, even *inter vivos*, be transmitted to a singular successor or purchaser, unless by means of devices which assumed the onerosity of the transaction, invented for overcoming the superior's rights and privileges, the attempt to exclude the succession of the lawful heir by gratuitous *mortis causa* conveyance, although not exposed to the objection of deathbed, was probably found impracticable. We find, accordingly, that as the notion of the uncontrolled transmissibility of feudal property gained

ground, the right of the heir came in practice to be excluded by a mere subtlety, the conveyance being made absolute, or *de præsenti*, as regards the terms of the conveyance; whilst by means of a clause dispensing with the delivery, although under a reserved power of revocation and right of liferent, the testator remained the substantial proprietor of the subjects. Nor is it even essential that the deed shall contain a clause dispensing with the delivery, when it clearly appears by the tenor of the deed that it is truly *mortis causa* (*c*). A deed thus in form *inter vivos*, containing dispositive words, although in effect testamentary, has accordingly been sustained as an effectual settlement of heritage (*d*); but clauses in proper testaments, in terms burdening or affecting feudal subjects or *quasi feuda*, or merely equivalent to the *institutio hæredis* of the civil law, have been refused effect; and therefore the bare appointment of an heir of provision, without a conveyance in his favour, either general or special, is insufficient directly to exclude the heir-at-law, or even to ground an action of adjudication in implement against him (*e*). Testamentary deeds of a mixed nature thus became common in practice; but as the general disposition and settlement as a form for bequeathing legacies presents nothing peculiar, it is sufficient to refer to the Style Book.

(*a*) Craig, 2. 1. 28.

(*b*) Stair, 3. 8. 29, 31; Ersk. 3. 8. 20.

(*c*) Brack, 23d Nov. 1827, F. C., S. 6. 113, affd. W. S. 5. 61, and auth. cited. The indications here were a reserved liferent, and a direction to the trustee to look to the granter's *will* for his instructions.

(*d*) Ersk. as in (*b*); Douglas, 11th July 1733, M. 15,940; Binning, 25th June 1742, Elch. *Testament*, 7; Willoch, 14th Dec. 1769, M. 5539, 15,945, Hailes, 321, 344, affd. on app. M. 5544; Robertson, 17th June 1785, M. 15,947; Redford, 5th Dec. 1816, Bar. Hume, 884: there was here a combination of dispositive and testamentary words applicable to heritage; but the former being *de præsenti*, the deed was sustained as a conveyance of heritage.

(*e*) Erak. as in (*b*), and cases in text; Ogilvie, 10th Dec. 1793, M. 3336, 15,950, affd. M. 3343.

## TITLE V. TRUST-DISPOSITION AND SETTLEMENT.

73. INTRODUCTORY REMARKS.—1. *Forms of the conveyance in trust.*—The trust-settlement is the general disposition and settlement, with those clauses engrafted on it which are necessary for constituting a trust. It followed, as a necessary consequence from sustaining the *mortis causa* conveyance of heritage in favour of a stranger under the burden of legacies, that the right of the heir could be defeated by a conveyance of that nature to trustees for the payment of legacies and provisions. But a question arose, whether the rule extended to directions expressed in a subsequent deed. For the heir it was contended, that his title to require the trustees to denude in his favour, as representing the truster, could not be excluded by a deed purely testamentary; but the Court held that the alienation in the prior deed being in a feudal sense perfect, or capable of being completed, the heir had neither title nor interest to challenge the directions under which the trustees were to dispose of the subjects, if duly declared in *liege poustie* (*a*). This determination has since been extended to testamentary directions contained in deeds executed with the formalities of the law of the country in which the testator's domicil for the time is situated, as furnishing clear evidence of intention (*b*).

2. *General nature of the office of testamentary trustee.*—The office of testamentary trustee being of modern introduction, our institutional writers will in vain be consulted for an explanation of its nature and duties. These are, indeed, as yet but imperfectly defined in the decided cases, and on this important subject our law and forms

must be considered as in a state of transition. The nature of the office of trustee for creditors is fully explained in the very learned Commentaries of Professor Bell, and seems to be a modification of the offices of depositary, factor and mandatary, irrevocable, however, without the consent of those interested in the estate, for whose behoof they have been conferred. That of testamentary trustee is of a very different nature, being apparently a combination of the offices of executor and depositary, qualified by the important element of the gratuitous performance of his duties. The office of executor supplies the necessary powers to sue for and realise the estate, and that of depositary in some degree prescribes rules for its management and disposal, which are completed by the additional authority conferred in the deed. And where there is a conveyance also of the heritable estate, the trustee is made a conditional fiar of the heritage. It is thus obvious that he can incur no greater responsibility by his acceptance of the office to which he is nominated by the testator than belongs, on the one hand, to an executor, and on the other, to a mandatary acting without remuneration. It would therefore appear that a testamentary trustee acting gratuitously is, in the language of Stair, "only "liable *quoad dolum et culpam latam*, and for supine "negligence," in like manner as an executor who takes no benefit by the testament, or a gratuitous depositary (*c*). And, as exercising authority resembling that of a mandatary, he seems to be liable at common law solely for his individual intromissions, and in that degree of diligence only which one is supposed to exercise in the management of his own affairs (*d*). Nor are those privileges lost by his accepting a legacy, or even a small sum expressly given by the testator on account of trouble. It is accordingly assumed in the leading cases on the subject,

that the actings of testamentary trustees are to be favourably regarded (*e*).

(*a*) Willoch, 14th Dec. 1769, M. 5539; Hailes, 321, 344, affd. on ap. M. 5544.

(*b*) Brack, 23d Nov. 1827, F. C., S. 6. 113, affd. W. S. 5. 61; Cameron, 19th May 1831, F. C., S. 9. 601. (See note of Lord Corehouse.)

(*c*) Stair, 3. 8. 64; Ersk. 3. 1. 26, 32. See Ersk. 3. 9. 41; Lord Gillies, in Thomson, 16th Feb. 1838, F. C., D. 16. 560.

(*d*) Ersk. 3. 3. 36.

(*e*) See Thomson, as in (*c*).

74. STRUCTURE OF THE DEED.—The trust-disposition and settlement consists of two principal branches, the testamentary part, which does not fall by the expiration of the trust as such, unless where the main issue of the trust, and the substantial interest under it, are to depend on the discretion of the trustees (*a*), and the clauses for producing the machinery of the trust. Prior to the introduction of this useful, although complicated form of settlement, the wishes of a testator were carried into effect by burdening the executor in moveables, and the heir in heritage, with the debts, legacies and provisions due and bequeathed by the testator; and in regard to the moveable succession, this was accomplished by means of the last will and testament, which is treated of above. The executor is in law a trustee for the benefit of all concerned, and possesses the necessary powers for realising and distributing the estate; but in course of time the necessities of an advancing society, in which individuals were daily accumulating moveable property to a large amount, called for the introduction of deeds, adapted not merely for the collection and distribution of the estate of a deceased person among his relatives and legatees, but framed also so as to protect the rights of annuitants, and of minors and others having ulterior interests, and to supersede, by conventional ar-

rangements, the ordinary rules of law in regard to succession. Hence arose the trust-settlement, which has for its objects the collection, disposal and distribution of the estate, and likewise the intermediate protection of the interests of postponed parties, and consequently the management of the shares set apart for their ultimate benefit. The subject of trusts is one of much intricacy and importance, and of too large a scope for a work of this description, and the following observations will be chiefly confined to the clauses and purposes more immediately connected with the management of the estate.

(*a*) Fraser, 2d Feb. 1818, Bar. Hume, 885; Dick, 22d Jan. 1758, M. 7446, 16,206.

75. CLAUSES OF THE DEED (*a*).—The number and arrangement of the clauses are not well ascertained. Much variation occurs in the form of this deed, occasioned by the different views of conveyancers in regard to the powers necessary to be conferred on the trustees. The most usual are these: 1. The *Inductive*; 2. The *Dispositive*; 3. *Purposes of the trust*; 4. Clause conferring *powers on the trustees*, which usually consist of a power to *enter into possession; output and input tenants; compound and submit claims; uplift principal sums; borrow money; sell; appoint factors; assume new trustees*; 5. *Clause appointing executors*; 6. *Clause appointing tutors and curators*; 7. *Clause of immunity*; 8. *Reservation of liferent and power to alter*; 9. *Dispensation with delivery*; 10. *Clause of Registration*; 11. *Testing clause.*

(*a*) Reference is made to the forms contained in the Juridical Styles, vol. 1. p. 257, *et seq.*; vol. 2. p. 441, *et seq.*

76. INDUCTIVE CLAUSE (*a*).—Reference is made to § 62.

(*a*) I, A., considering it to be every one's duty in his own lifetime to settle his affairs in such a manner as to prevent all disputes after his death, and having full trust and confidence in the persons after mentioned for executing the trust herein after reposed in them.

77. DISPOSITIVE CLAUSE (*a*).—1. *Terms of conveyance.*—In regard to the effect of the terms of conveyance of moveables, see § 66. The subjects may be either generally or specially described.

2. *Nomination of trustees.*—This matter is treated of in the author's Feudal Conveyancing, § 324.

(*a*) Do therefore and for other good causes and considerations GIVE GRANT and DISPONE to and in favour of B. C. and D. and to the survivors or survivor of them who shall accept and to the heirs (or heir-male) of such survivor but that always in trust for the ends uses and purposes herein after mentioned and declaring that a majority of my said trustees and of such trustees as shall be assumed into the trust in manner after mentioned accepting and surviving shall at all times form a quorum for executing the purposes of this trust ALL lands and heritable estate of every description that shall belong to me at the time of my death AS ALSO my whole moveable and personal means and estate of whatever kind and denomination heirship moveables included that shall belong to me at the time of my decease AND I bind and oblige me and my heirs and successors to grant all necessary deeds in favour of my said trustees for implementing and fulfilling the above general disposition of my heritable and moveable means and estate.

78. PURPOSES OF THE TRUST (*a*).—1. *Payment of debts and expenses.*—Debts and expenses of management, after the payment of deathbed and funeral expenses, form a preferable subject of deduction. (1.) In regard to debts, it has been held that trustees may pay *primo venienti*, until interpelled, in like manner as an heir (*b*); but the safe course is to bring a process of multiplepoinding in all cases where there are doubts of the solvency of the estate (*c*). (2.) Expenses include the ordinary and usual charges of management, law expenses *bona fide* incurred, factor's salary and commission, when the appointment

of a factor is authorised or implied, and he acts also as cashier, and the personal expenses of the trustees necessarily incurred in the execution of the trust, who are entitled to be kept *indemnes*. In estimating these deductions no express rule can be laid down. They belong to the province of the Auditor of Court, or an accountant.

2. *Practical rules as to legacies and provisions.*—(1.) The terms for expressing legacies are considered at § 64; and the structure of the more complicated clauses of settlements is discussed at § 51, *et seq.* As to the forms of clauses reference is made to the style books. Those exemplified in the Juridical Styles, although too limited in their scope, appear to be in general correct, and well adapted to practical use (*d*). It is worthy of observation also, that the numerous clauses above referred to, (§ 55,) as having formed subjects of judicial discussion, (although, in as far as supported by the Court, they may likewise with safety be followed in the preparation of deeds,) usually deviate much from the approved forms of style. (2.) A knowledge of the effect of particular clauses and forms can only be acquired by a careful perusal of the decided cases, which, on this branch of practice, form an indispensable object of the study of the practical conveyancer, who can thence alone judge with accuracy of the powers of clauses, whether contained in style books or completed deeds, when consulted as forms, or presented to his notice professionally. The following particulars are, however, deserving of notice as entering more or less as elements into the construction of clauses in settlements: 1*st*, The description of the legatee, which ought to be precise; (above, § 50, 64. 6.) 2*d*, The definition of the legacy (*e*); (§ 64.) 3*d*, A substitution of heirs, (where it is intended that heirs shall succeed,) in all cases of single legacies and provisions to strangers, and even to relations not the immediate issue of the testator unless when made to a family or class

without the omission of any individuals of the class; because in these situations there is no room for the operation of the condition, *si institutus sine liberis decesserit*, but, on the contrary, the presumption of *dilectus personæ* has place; (§ 50, 51. 5, 58.) *4th*, An express declaration of the precise period at which it is intended that a legacy or provision shall vest in the legatee, and thus become available for the purposes of voluntary and legal transmissibility, so as to form not only a fund for provisions in a marriage-contract, but likewise a part of the moveable estate of the legatee on his decease, whether such estate is to remain subject to the operation of the law of moveable succession, or be regulated by his own deed. A declaration of this nature is at least advisable in all those numerous cases involving ulterior substitutions or postponed interests; (§ 55.) *5th*, An express declaration, (when it is so intended,) that annuities or legacies to the wife or children are to be accepted in lieu, or as part of their legal provisions; (§ 64. 3.) *6th*, A provision in regard to a second or any future legacy, that it is to supersede, or be in addition to the former, as intention may dictate; (§ 64. 4, 5.)

(*a*) BUT IN TRUST always for the ends uses and purposes after specified viz. IN THE FIRST PLACE for payment of all my just and lawful debts deathbed and funeral expenses and the expense of executing this trust. SECONDLY For payment to &c. (*legacies and provisions expressed according to the approved forms.*)

(*b*) Rankine, 24th Nov. 1741, M. 16,201; Alison, 22d Jan. 1793, M. 16,211. These cases related to conveyances chiefly, if not wholly, of heritage.

(*c*) See Thomas, 4th July 1829, S. 7. 828.

(*d*) Jurid. Styles, 2. 467, 493.

(*e*) Jurid. Styles, 2. 478. The chief forms of simple legacies are in general expressed with accuracy and conciseness.

79. POWERS, DUTIES AND LIABILITIES OF THE TRUSTEES (*a*).—1. *General nature.*—To consider in detail the usual powers conferred on the trustees by the deed of settlement would be foreign to the object of this work, as

they embrace almost all the modes of dealing with property competent to a proprietor. Many of them, indeed, flow necessarily from the title acquired by the trustees, and their introduction seems therefore to be superfluous. (1.) Thus the powers relating to heritage, of *entering into possession, removing tenants, receiving rents, &c. and setting tacks*, seem to be inherent in the office of a trustee infeft, and having general powers of management. (2.) In like manner the power connected with moveables, of *suing for and uplifting principal sums and debts*, (although not perhaps of re-investment,) belongs to the office of executor. (3.) Even the *power of sale* may be inferred from the purposes of the trust, *e. g.* a direction to pay debts or provisions (*b*); but the power to sell a fee-simple estate, in order to purchase other lands to be entailed is unfavourable, and must be expressed (*c*). (4.) The right *to enter vassals* seems inherent in a fee although held in trust; at least it is implied in the faculty to sell, which imports complete feudal power over the subjects (*d*). (5.) It is more doubtful whether trustees can *borrow money* without express authority, as being inconsistent with their office, which is to recover, hold and distribute the proceeds of the estate; but authority to sell for payment of debts implies the power to borrow money to the required amount; for otherwise the trustees might be constrained to dispose of property to a disadvantage (*e*). (6.) Authority to *compound and submit*, as not possessed by an executor, ought always to be expressed, (although trustees seem to have this power, when necessary in the fair and reasonable management of the affairs,) (*f*), as well as to reduce rents, and the interest of sums heritably secured. (7.) The *assumption of new trustees* can proceed only in virtue of an express clause, which is generally contained in an after part of the deed. (8.) It is advisable to confer in general such powers as are necessary for implementing the purposes of the trust.

2. *Appointment of factors.*—The clause authorising the trustees to devolve the management of the estate on a factor is of much practical importance, and deserves particular notice. (1.) It has been held that in trusts relating to large estates, and inferring intricate and protracted management, the appointment of a factor for transacting the ordinary business of the trust is a power in the discretion of testamentary trustees, who are in general chosen more out of confidence in their friendship and character, than from their possessing an intimate knowledge of business. And it does not appear that trustees incur a larger measure of responsibility, by making such an appointment under this implied power, than in virtue of authority in the deed; although, as the question must always remain, how far the assistance of a factor is necessary in the particular case, an express power is in every instance expedient. The rules in either case seem to be, that the factor must be generally esteemed (or as it is styled, *habit and repute*) responsible at the period of his appointment; that the trustees must exercise efficient control over the factor by due annual examination of his accounts, leaving no larger sum in his hands than is sufficient for the current purposes of the management; and that they are responsible for loss occasioned by a relaxation of such control on their part, or through the bankruptcy of the factor, if this event was, or ought to have been foreseen by the trustees. Questions of this nature manifestly depend greatly on circumstances, and trustees, whether with or without a protecting clause, cannot be too circumspect as regards the conduct of their factor (*g*). (2.) Trustees may appoint either a stranger or one of their own number as factor, cashier or agent, who becomes responsible, and entitled to remuneration as such (*h*). It must be obvious, however, that no general rule for the remuneration of a factor and cashier can be laid down, where so much depends on the nature of the business done, and the responsibility in-

curred (*i*). It is a common practice for one of the trustees, called the *acting trustee*, to perform the duties of factor without an express appointment; but when the testator has himself nominated a factor in the deed, the person so appointed cannot, in ordinary circumstances, be superseded, unless with his own consent (*k*). It follows, that, in the common case, the other trustees are under no responsibility for his actings. (3.) A factor may have authority to sell delegated to him (*l*); but the power of sale does not necessarily include a mandate to receive and discharge the price, both being acts of extraordinary administration. (4.) It is not easy to define what are to be considered acts of ordinary administration, which may be done by a factor without special authority, and those of extraordinary administration, requiring the concurrence of the trustees, or their quorum. The former appear to relate to the mere routine of management, such as receiving and discharging rents, interests and dividends, paying annuities and current expenses, and conducting correspondence in relation to matters of daily occurrence; whereas the latter seem to include the sale of property, reduction of rents or interest, purchase and transfer of stock, discharge and assignation of capital sums, discharge of the price of subjects sold, authority to raise actions and enter into submissions, settlements with factors and agents; and generally such matters as relate to the conduct of the trust, contradistinguished from necessary acts of management involving no question for the deliberation of the trustees. But it is common in practice to intrust factors with special powers to manage the more important concerns of the trust,—powers over which, it is manifest, that the trustees ought to exercise a more efficient control than in regard to acts of ordinary administration.

3. *General management of the estate.*—(1.) The actings of the trustees or their factor will, in so far as pre-

scribed by the deed, be in strict conformity with the directions of the testator. To this extent there can be no difficulty, and from these there ought to be no deviation. Much of their conduct depends, however, of necessity, on the ordinary rules of business and affairs. (2.) Trustees are not employed to make profit of the trust-funds or subjects beyond the ordinary interest of money or the rents of heritage. Their duty lies in realising the estate, holding it under the protecting influence of their office for behoof of the favoured parties, keeping correct accounts of intromissions (*m*), and finally distributing it among those parties, when all intermediate purposes have been accomplished. (3.) As regards the recovery of the trust-moneys, there must not be *supine negligence;* (above, § 73. 2); but no particular energy of management is required: such as one employs in his own affairs would appear to be sufficient. Although, in modern practice, it is not expected that trustees shall take out decrees or diligence against debtors in notoriously desperate circumstances, these must be obtained and put in force when there is a fair prospect of payment. (4.) Sales of property must be conducted according to established rules, and with due attention to the interests of the beneficiaries; and when a power of sale is merely implied, the Court will interpone their authority (*n*). The trustees are debarred from becoming purchasers (*o*). (5.) Trustees cannot be interpelled from proceeding in the management by means of inhibition, but by suspension and interdict only (*p*). (6.) The general rules for the management of trust-funds, retained for ulterior purposes, when no particular directions have been embodied in the deed, or in separate probative writings, are not intricate. Trustees, like individuals, may be unable to invest trust-moneys in securities of the first order; but they cannot be at a loss in placing them in safety, and all investments ought to be in

their joint names as trustees. If they should fail in procuring heritable security of unquestionable sufficiency, (mere personal security ought never to be accepted unless expressly authorised by the deed,) they have the Government funds and the established banks, in which the moneys can safely be deposited until investments are obtained. (7.) The division of the estate among the beneficiaries is a matter of mere form, when the purposes of the trust and the rights of the parties are clear; but if serious doubts occur, the trustees will have recourse to judicial determination. (8.) Some particular rules in regard to management, &c. may be deduced from the decided cases.

4. *Extraordinary purposes.*—These chiefly relate to the investment of funds in land or heritable securities.

5. *Accumulations and interest on provisions.*—(1.) Sums accrescing to the trust-funds in the course of management belong to the beneficiaries whose provisions form the subject of management, according to their interests in the estate (*q*). (2.) The interest or other proceeds of moneys to be laid out in the purchase of lands appointed to be entailed, belong to the intended institute and substitutes in their order, in the same manner as rents, and do not go to increase the investment (*r*).

6. *Rights acquired by the trustees.*—These cannot be used to the prejudice of the beneficiaries (*s*).

7. *Eases.*—It is a general rule, that trustees receiving deductions or *eases* from creditors must account for these as forming part of the estate; their management being for behoof of others, and not on their own account (*t*).

8. *Interest on trust-funds.*—(1.) The rules on this head are not well ascertained. At a former period executors were held liable for interest on such sums only as bore interest at the time of the testator's death (*u*). But, in modern practice, trustees and executors are liable to account for the interest actually received by them for moneys

remaining in their hands. (2.) Trustees have, in peculiar circumstances, been subjected in loss of interest occasioned by their own misconduct; (below, § 82. 5.)

9. *Expenses of management.*—These, in the general case, fall on the residue, which may be described as a postponed legacy. A different rule has been applied where the ordinary legacies are the subject of separate management (*v*).

10. *Multiplepoinding and exoneration.*—Trustees are entitled to throw the estate into the hands of the Court when unable to obtain extrajudicial exoneration, even where there is no double distress; and this course is often necessary for their protection in cases which involve conflicting claims. Multiplepoinding and exoneration in name of the trustees is also competent to a beneficiary whose interest is not conceded (*w*). This action may embrace heritage appointed to be sold or conveyed to the trustees for payment of debts and provisions; but a process of reduction by the heir will stay the proceedings as regards heritage (*x*).

11. *Liability.*—Trustees are liable only as such, and cannot be compelled to make funds furthcoming beyond the extent of the estate, unless they have expressly undertaken personal responsibility (*y*), or have been guilty of *culpa lata.* (See *Clause of Immunity.*) The proper warrandice by trustees is from fact and deed; but they must bind their constituent directly in absolute warrandice, and a disponee is not bound to accept a mere assignation to a clause in the trust-deed (*z*).

(*a*) Jurid. Styles, 2. 442. *(The following are the more usual powers):* —With power to the said trustees to enter into possession of the said trust-estate and to sue for uplift and discharge the rents and other fruits and profits thereof; As ALSO with power to output and input tenants and grants tacks and leases of the heritable estate hereby conveyed not exceeding nineteen years at such rents and on such conditions as to the said trustees shall seem proper; As ALSO with power to compound transact and

agree and refer to arbitration any questions or differences which may arise in the course of their management of the said trust-estate; As ALSO with power to sue for uplift discharge renounce assign and dispone and if necessary re-invest the principal sums debts and securities forming part of the trust-estate with all interest due thereon and to reduce the rate of interest payable upon loans to the market rate as to my said trustees shall seem advisable; As ALSO with power to sell all or any part or portion of the said trust-estate and that either by public roup or private bargain and to grant and enter into all necessary deeds for accomplishing and completing the said sales and the conveyance of the said subjects to the purchasers containing all necessary clauses; As ALSO to borrow money upon the security of the said trust-estate for the purposes of this trust and grant deeds containing all clauses necessary for that purpose; DECLARING that the persons who as lenders debtors or purchasers shall pay any sums of money to the said trustees shall be noways concerned with the application thereof; As ALSO with power to appoint factors either of their own number or other fit persons for conducting the ordinary administration of the said trust-estate or for such special matters as may from time to time be intrusted to them by the said trustees and to allow such factors suitable gratifications for their trouble: AND WITH SPECIAL POWER to the said trustees or the survivor from time to time to discharge such trustee or trustees as may from time to time desire to withdraw from the said trust when their retirement shall not appear to the remaining trustees to be at the time inexpedient and also to nominate and assume in room of such trustees or trustee as shall happen to die or become legally incapable or be discharged as aforesaid such other person or persons as they shall think fit to be a trustee or trustees along with them and after their decease Declaring that the powers and privileges of such assumed trustee or trustees shall be as extensive as if their names were herein inserted as trustees or trustee and for that purpose to grant all deeds necessary for investing such assumed trustee or trustees in conjunction with my said trustees or their survivor with the said trust-estate with the powers and privileges and subject to the burdens conditions and declarations herein expressed.

(*b*) Erskine, 13th March 1829, F. C., S. 7. 594; Campbell, 4th Dec. 1838, F. C., D. B. M. 1. 153.

(*c*) Robertson, 7th March 1832, S. 10. 438, as reversed on ap., Bell, Illustr. 2. 553.

(*d*) Ker, 7th Dec. 1838, F. C., D. B. M. 1. 179.

(*e*) Dewar, 4th Dec. 1792, Bell's Cases, 541.

(*f*) Bell, Pr. 1998.

(*g*) See Dalrymple, 4th Aug. 1784, M. 3534, 16,210; Sim, 13th May 1830, F. C., S. 8. 741; Home, 30th Nov. 1837, F. C., S.; Thomson, 16th Feb. 1838, F. C., D. 16. 560.

(*h*) La. Montgomery, 4th June 1822, F. C., S. 1. 453. This case was finally disposed of on a remit from the House of Lords, and certain rules of accounting adopted.

(*i*) See Graham, 4th March 1831, F. C., S. 9. 543.

(*k*) Macalister *v.* Fulton, 15th Feb. 1831, F. C., S. 9. 442.

(*l*) Thomas, 4th July 1829, S. 7. 828, and 4th Dec. 1832, S. 11. 162.

(*m*) Gourlay, 28th Nov. 1710, M. 16,192; Home, 27th May 1712, Robertson, Ap. 47.

(*n*) Erskine, as in (*b*).

(*o*) Mackenzie, 8th March 1793; reversed, 13th May 1793, Dow, 4. 380; Smith, 10th Feb. 1826, S. 4. 442; Drew, 2d Dec. 1825, Ib. 259; Jeffrey, 16th June 1826, F. C., and S. 4. 722.

(*p*) Hog, 7th July 1838, F. C., D. 16. 1725.

(*q*) Torrie, 31st May 1832, S. 10. 597.

(*r*) Templar, 14th Feb. 1826, W. S. 3. 47; E. of Stair, 19th June 1827, W. S. 2. 414 and 614; Howal's Trustees, 7th Feb. 1838, D. 16. 622; Campbell, 30th June 1838, D. 16. 1251.

(*s*) Wright, 24th June 1712, M. 16,193; Anderson, 21st Nov. 1740, Elch. *Trust*, 10.

(*t*) E. of Northesk, 21st Feb. 1702, B. S. 4. 529; E. of Crawford, 6th March 1767, M. 16,208, and cases cited; see Ersk. as to executors, 3. 9. 42. See, as to the presumption deducible from general terms used in expressing the consideration in a discharge and assignation, Chalmers, 20th Feb. 1735, Elch. *Trust*, 3 and 7.

(*u*) Ferguson, 16th June 1763, M. 541; Watsons, 12th Dec. 1765, M. 541; Arbuthnot, 4th Jan. 1758, M. 539.

(*v*) Laird and Co. 24th Nov. 1836, F. C., D. 15. 120. See Macalister, 30th Nov. 1836, F. C., D. 15. 170.

(*w*) See M'Dougall's Trustees, 9th July 1830, S. 8. 1036; Dixons, 5th March 1833, S. 11. 517; Taylor, 24th May 1836, D. 14. 817.

(*x*) See M'Dougall's Trs., as in (*w*).

(*y*) Hamilton, 16th May 1823, S. 2. 315. In this case the trustees had got access to title-deeds under the condition of payment of an account. See Thomson, 24th June 1829, S. 7. 787. Here trustees were held personally liable, in peculiar circumstances, in the contents of bills.

(*z*) Forbes's Trustees, 15th June 1822, S. 1. 497.

80. APPOINTMENT AS EXECUTORS (*a*).—The trustees are uniformly nominated executors.

(*a*) AND I do hereby NOMINATE CONSTITUTE and APPOINT the said trustees herein named and the acceptors and survivor of them to be my sole

executors and intromitters with my moveable estate with all powers competent by law to executors.

81. INCIDENTAL POWERS.—These chiefly consist in discretionary powers to give or withhold, or to divide a legacy or provision. (1.) The exercise of a power to pay a legacy left in the discretion of the trustees, is essential to its vesting, so as to be transmissible to heirs (*a*). (2.) A power of division is similar in effect to the faculty inherent in a father to divide a provision among children, and must be exercised by giving equal portions to the favoured parties, or at least so as not to exclude any of them absolutely, as by an elusory share (*b*). But the exercise of the power is not a condition of the bequest, which divides equally by law failing a division by the trustees (*c*). And the faculty must be strictly exercised: thus a power to reduce the share of a beneficiary, and apportion the part to be withheld with consent of the liferenter of the fund, falls if not exercised before the liferenter's death (*d*). (3.) A power of division has, in certain circumstances, been held to suspend the vesting of a provision; (above, § 55. 2.)

(*a*) Burnsides, 10th June 1829, S. 7. 735.
(*b*) Marjoribanks, 17th Feb. 1837, F. C.
(*c*) Marjoribanks, as in (*b*).
(*d*) Clerks, Feb. 1686, M. 8060.

82. APPOINTMENT AS TUTORS AND CURATORS (*a*).—When the beneficiaries, or some of them, are in nonage, the trustees are ordinarily appointed their tutors and curators. Acceptance of these offices necessarily imposes on the trustees the obligations of the statute and common law incumbent on those holding them, and the broadest clause of immunity is ineffectual to relieve the trustees from the consequences of neglecting the legal forms (*b*).

(*a*) AND I do hereby NOMINATE and APPOINT the said trustees herein

named and the acceptors and survivor of them to be tutors and curators to my lawful children procreated and to be procreated of my body during their respective pupillarities and minorities, the major part of the said tutors and curators accepting and surviving being always a quorum.

(*b*) Murray, 19th Dec. 1833, F. C., S. 12. 237. (*Clause.*)—Declaring that my said trustees shall not be liable for omissions of any kind nor for the insolvency of factors or others whom they have occasion to employ for uplifting any sums of money or disposing of any of my effects nor for the insolvency of any person to whom they may lend out money for answering the purposes of this trust nor shall they be answerable for the omissions of one another but each only for his own actual intromissions and that the said tutors and curators shall not be liable in diligence or *in solidum* nor for omissions but each for his actual intromissions. See 1672, c. 2.

83. CLAUSE OF IMMUNITY (*a*).—1. *Effect of the clause.* —(1.) The general nature of the office of testamentary trustee precludes the supposition that trustees without a protecting clause are liable in exact diligence, or *singuli in solidum*, or for omissions; (above, § 73. 2.) And accordingly, in a recent case, it has been expressly held that trustees in that situation are liable only for *culpa lata*, terms of uncertain meaning, but which are interpreted favourably to the trustees. A different principle would inevitably give rise to some other mode of agency, as no person of any prudence, whom a testator would be willing to trust, could be found to undertake an office of so great responsibility (*b*). (2.) There appears, indeed, to be no real difference in a question of responsibility, whether as regards intromissions or the actings of a factor, between trustees without a clause of immunity and those possessing a clause in the terms usually employed (*c*); for it would seem to result from the more recent cases, that the words, *each for his own actual or personal intromissions only*, hitherto supposed of so much practical importance in protecting trustees, are controlled by the effect of a joint discharge, which has been held to imply individual intromission on the part of all the subscribers (*d*); and a distinc-

tion in one instance indicated between *actual* or *personal*, and *constructive* intromission, does not appear to have entered into the consideration of the Court in other cases (*e*). It is at least certain that there is only one clearly ascertained mode of excluding constructive intromission on the part of trustees who are unable, from distance or other causes, to attend personally to the proper investment of money coming into their hands in the course of management, by the adoption of a clause in the terms or to the effect of that employed in the case of Murray (*f*). (3.) Immunity from the consequences of the insufficiency or inadequacy of securities, when intended to be given, ought to be expressed; but the protection does not extend to a trustee who acts in the separate character of agent in transacting a loan (*g*). (4.) A clause of assumption of new trustees necessarily places a trustee nominated under such authority on the same footing with the original trustees in questions of responsibility, whether as affecting himself or his co-trustees. (5.) It is manifest, however, that a clause of immunity is of force only for the protection of such trustees as act with perfect good faith in the execution of the trust committed to them. The circumstances in which a protecting clause is inoperative are various.

2. *Trustees acting contrary to directions, or beyond their powers.*—A protecting clause can give no immunity to those who transgress the directions of the trust-deed, the plain meaning and intent of the office of trusteeship, or the purposes of the testator, and are thus not merely chargeable with omissions, but guilty of positive commissions. (1.) Thus a trustee who pays, or concurs in the payment to a husband and father, of money which it was the express object of the testator to secure by means of a trust for the liferent benefit of the wife, and to the children in fee, incurs personal responsibility by thus transgressing, or permitting a co-trustee to transgress the plain direc-

tions of the deed (*h*). And payment to one having no title to receive and discharge, *e. g.* a person in course of obtaining the appointment of *curator bonis* to a beneficiary, but who has not found caution in terms of law and extracted his commission, plainly infers a similar liability (*i*). (2.) Other examples of situations where personal liability will be incurred by a testamentary trustee through transgression of the testator's directions, or the purposes of his appointment, are the leaving, on insufficient or inadequate security, in the debtor's hands until his bankruptcy, funds which the truster had appointed to be uplifted when due, and applied to the purposes of the trust (*k*); permitting a co-trustee to retain trust-funds, of which the testator had directed the investment in sufficient security (*l*); and throwing off the character of trustee by taking debtors bound to him *proprio nomine*, and thus exposing the trust-funds to the claims of his private creditors (*m*).

3. *Expenses of litigation.*—(1.) The most broadly expressed clause will not secure a trustee against the consequences of improper litigation. A distinction was drawn between the liabilities of trustees in sequestrations under the former bankrupt statute, and testamentary trustees, as regards expenses. The former were bound to make funds furthcoming, as possessing a right of relief against the creditors who had lodged claims on the estate; but the latter, as they can only have recourse on the funds managed by them, are, in the general case, not personally liable in expenses of process. But the Court will give a personal decerniture against trustees when there is wanton litigation, gross misconduct in the course of a process, or improper opposition on their part to a decree of constitution against the estate (*n*); and it is obvious that trustees subjected in personal liability can have no title to repay themselves out of the trust-funds. (2.) Litigation for the purpose of clearing up points left doubtful by the testa-

tor, and thus forming obstacles to the management of the trustees, is necessary and advantageous, and the expense of trying questions fairly falling within this category, whether raised by the trustees or a party having an interest, has usually been laid on the trust-estate without reference to the issue (*o*).

4. *Loss from refusal to act.*—Trustees by their acceptance come under an implied obligation to execute the trust, and are not permitted to resign their office at pleasure, more especially when a sufficient number would not remain to form a quorum or carry on the management. When, therefore, a trustee is an essential component part of the quorum, he must concur in necessary acts of administration, and subscribe all requisite deeds; and refusal or groundless delay on his part will subject him personally in the loss that may arise through his contumacy (*p*).

5. *Loss from refusal to invest funds.*—There is an instance where trustees who had not obeyed the directions of the truster to lay out the funds on heritable security or bank securities, and refused, when required by the whole beneficiaries, to invest them in Government stock, were held liable in the loss thus incurred to the estate (*q*).

(*a*) DECLARING that the said trusteees named and to be assumed, and the said executors, and tutors and curators, shall not be liable for omissions, errors or neglect of management, nor *singuli in solidum*, but that each shall be liable for his own actual intromissions only; and that they shall not be farther liable for any factor or factors whom they may appoint, than that such factor or factors are habit and repute responsible at the time of appointment. See note (*f*).

(*b*) Thomson, 16th Feb. 1838, F. C., D. 16. 560.

(*c*) See Cowan, 13th May 1836, F. C., D. 14. 744; and compare with Thomson, as in (*b*). See above, § 77.

(*d*) Lord Corehouse, in Murray, 6th Feb. 1835, F. C., S. 13. 417.

(*e*) See Kennedy, 28th June 1827, S. 5. 852; Moffat, 31st Jan. 1834, F. C., S. 12. 369; Blane, 28th Jan. 1836, F. C., D. 14. 361.

(*f*) Murray, as in (*d*). (*Clause.*)—Declaring that my said trustees and my executors acting under and by virtue of these presents shall not be liable

for any omissions or neglects in their management nor for the intromissions or solvency of the factors or others whom they may employ or the debtors whom they intrust but shall only be bound to act honourably and shall only be liable for their actual intromissions and each of them for himself and his own actual intromissions respectively and no farther.

(*g*) See Graham, 4th March 1831, F. C., S. 9. 543.

(*h*) Blackett, 29th and 30th May 1832, F. C., S. 10. 590; Anderson, 12th Feb. 1833, F. C., S. 11. 382; Mayne, 4th June 1835, F. C., S. 13. 870.

(*i*) Donaldson, 18th June 1833, F. C., S. 11. 740.

(*k*) Moffat, 31st Jan. 1834, F. C., S. 12. 369. This is a very instructive case to trustees. The debtor was a co-trustee.

(*l*) Blane, 28th Jan. 1836, F. C., D. 14. 361.

(*m*) Murray, 5th Dec. 1797, M. 3237.

(*n*) Cundell, 14th Dec. 1822, S. 2. 89; Dickson, 20th Nov. 1829, F. C., S. 8. 99; Murray, 24th May 1831, S. 9. 631; Wyllie, 15th Nov. 1834, S. 13. 40.

(*o*) Stainton, 17th Jan. 1828, S. 6. 363; Morrison, 30th June 1829, S. 7. 810; Stewart, 12th Feb. 1830, S. 8. 512; E. of Strathmore, 16th Feb. 1830, S. 8. 530, affd. W. S. 5. 170; Grieve's Trs. 9th June 1830, S. 8. 896; Bryden, 17th Feb. 1831, S. 9. 457, affd. 22d April 1833; Robertson, 7th March 1832, S. 10. 438; Rigg, 12th Feb. 1836, D. 14. 472; Black's Trs. 14th July 1837, S. and M'L. 2. 866; Duguid, 8th Feb. 1839, D. B. M. 1. 473.

(*p*) L. Lynedoch, &c. 15th Feb. 1827, F. C., S. 5. 358, affd. W. S. 4. 148, and sequel of case, 20th Nov. 1832, F. C., S. 11. 60.

(*q*) Morrison, 9th Feb. 1827, F. C., S. 5. 322. See also Darling, 16th May 1824, S. 12. 598.

84. RESERVATION OF LIFERENT AND POWER TO ALTER (*a*). —This clause is unnecessary, unless when the settlement embraces heritage. A *mortis causa* conveyance of moveables takes effect only on the death of the testator, whose liferent, therefore, need not even in form be saved; and as the power of revocation cannot be renounced, it is plainly superfluous to reserve it by an express clause; (above, § 68.)

(*a*) AND I HEREBY reserve to myself not only my own liferent of the estate and effects heritable and moveable real and personal above conveyed

but also full power at any time of my life and even on deathbed to alter innovate or revoke these presents in whole or in part as I shall think proper.

85. DISPENSATION WITH DELIVERY (*a*).—A clause, dispensing with the delivery of the deed, is liable to the above comment, (§ 84.) Testamentary deeds are valid without delivery (*b*).

(*a*) BUT DECLARING that the same so far as not altered or revoked by me shall be a valid and effectual deed though found lying in my own repositories or in the custody of any other person to whom I may intrust the same undelivered at the time of my death with the delivery whereof I have dispensed and hereby dispense for ever.

(*b*) Ersk. 3. 2. 44; Bell, Pr. 24.

86. CLAUSE OF REGISTRATION (*a*).—This clause is for the purpose of preservation only.

(*a*) AND I CONSENT to the registration hereof in the books of Council and Session or others competent therein to remain for preservation and for that effect constitute my procurators, &c.

87. TESTING CLAUSE (*a*).—This clause is in the ordinary terms; and the deed must be formally authenticated.

(*a*) In witness whereof these presents written on this and the preceding pages of stamped paper by A. R. clerk to A. D. writer to the signet are subscribed by me at Edinburgh the 29th day of February 1840 years before these witnesses the said A. D. and A. R.

# CHAPTER IV.

## MATRIMONIAL DEEDS.

### TITLE I. MARRIAGE-CONTRACT.

88. ANTE AND POSTNUPTIAL.—The general nature of the contract of marriage is adverted to in the author's Feudal Conveyancing. This contract may be entered into either before or after marriage, whence the distinction into antenuptial and postnuptial. The former is an onerous deed, and thus binding not only on heirs, but also on creditors, provided its clauses are expressed with sufficient technical precision. The postnuptial contract, again, is a deed of less security; (see *Postnuptial Contract of Marriage*); and therefore, where it is the intention, and in the power of the parties to regulate their affairs before marriage, this course ought invariably to be followed. It is only in regard to the means of preserving and protecting the subject of the agreement, and not to any extent in principle, that an antenuptial contract relating to moveable property differs from one which embraces heritage. But in one important feature, deeds which contain either kind of right resemble one another, and that is, in the necessity for resorting to the machinery of a trust in the person of a stranger when it is desirable to obtain the highest security which the nature of the agreement admits of, to the ultimate rights of the wife and children. Clauses in marriage-contracts may, it is true, be so framed as to give reasonable protection to these interests without the introduction of a third party as the fiduciary holder of the property, but never to the effect of excluding the influence of the husband and father.

For when the wife is the trustee, which is the more favourable case, it is still manifest that the joint act of the spouses will operate as a discharge to parties in possession of the trust-funds, or their joint conveyance give a good title to a purchaser; whereas a trust constituted in a marriage-contract, to trustees who are strangers may, by appropriate words of style, be made irrevocable even by the joint deed of the spouses (*a*).

(*a*) Anderson, 2d June 1837, F. C., D. 15. 1073.

89. CLAUSES OF THE DEED.—The antenuptial contract relating to moveables usually contains the following clauses: 1. *Introductory clause*, containing obligation to solemnise the marriage. 2. *Principal provisions in favour of the wife.* 3. *Provision of the conquest.* 4. *Provision of furniture and warrandice thereof.* 5. *Provisions of mournings and interim aliment.* 6. *Acceptance by the wife.* 7. *Provisions to children.* 8. *Declaration that the provisions to children are in full of legitim, &c.* 9. *Conveyance by wife.* 10. *Clause excluding the legal return of the provisions.* 11. *Provision for execution by trustees.* 12. *Clause of registration.* 13. *Testing clause.*

90. INTRODUCTORY CLAUSE (*a*). — 1. *Consideration.* — The inductive cause is the marriage of the parties, and the consequent change in their relation to one another, unless it is otherwise expressed (*b*).

2. *Effect of minority.*—(1.) An observation contained in the Juridical Styles, to the effect that a ratification is essential, after majority, of a contract of marriage made by parties one of whom was minor, is calculated to mislead as proceeding on a misconception of the case relied on, which relates not to a marriage-contract, but a deed executed by a married woman (*c*). There seems to be but

slender authority for the doctrine that a marriage-contract is reducible on the head of minority and lesion, or even that, as regards the spouses, there are any tangible grounds for restitution on the head of lesion. It is true that Erskine affirms the latter doctrine (*d*), but on reference to the cases which he cites, it will be found that only one of these relates to an antenuptial contract (*e*); and although the Court in this instance rectified the contract, by annulling a destination by the husband of a sum of money, in a certain event, to the wife's father, for which there was no adequate consideration, a provision to the wife of the minor husband's whole estate was sustained in full. The other cases relied on related to postnuptial contracts, and involved the plea of *donatio inter virum et uxorem*, competent as well to those of perfect age as to minors (*f*); and it has more recently been held, that even a postnuptial contract of marriage, although not of its own nature an onerous deed, is protected against reduction on the ground of minority (*g*). It would appear, however, that the Court in one instance sustained the plea of lesion in relation to an antenuptial contract (*h*); but the circumstances were very special, inferring fraud on the part of the husband, who, when *obæratus*, had obtained from the minor an absolute conveyance to her whole estate in consideration of a jointure which he was unable to secure for her. The ratification of a contract of marriage after majority seems therefore to be superfluous. (2.) Nor is it to be supposed that the objection of lesion, if truly competent to either of the spouses, could be renounced by a postnuptial deed, which would in itself be exceptionable, if granted without any consideration, as a donation. (See *Postnuptial Contract.*)

(*a*) It is CONTRACTED, AGREED UPON AND MATRIMONIALLY ENDED between the parties following, viz. A. on the one part, and B., eldest daughter

of C., on the other part, in manner following: That is to say, the said parties have accepted, and hereby accept of each other for lawful spouses, and promise to solemnise the holy bond of marriage with all convenient speed, according to the rules of the Church.

(*b*) Wightman, 30th July 1777, M. 9201.

(*c*) Gibson, 6th June 1809, F. C. See Hamilton, 25th July and 22d Nov. 1705, B. S. 5. 21, affd. on ap.

(*d*) Ersk. 1. 7. 38.

(*e*) Davidson, 4th July 1632, M. 8988.

(*f*) M'Gill, 22d Nov. 1664, M. 5696; Chalmers, 25th July 1710, M. 6056, and the sequel of this case, Lord Gray, &c. (Lyon's creditors,) 14th July 1714, M. 6059. See also Carmichael, 24th Feb. 1698, M. 8993.

(*g*) Youngs, 24th Jan. 1769, Hailes, 265.

(*h*) Byres, 28th July 1708, M. 6045, 8995.

91. PRINCIPAL PROVISIONS TO THE WIFE.—1. *Jus crediti.*—(1.) A provision by the husband to the wife, expressed in the ordinary form (*a*), gives a *jus crediti* in bankruptcy, as being onerous, and an essential condition of the marriage; but the wife can acquire a preference over her husband's estate only by means of diligence, security, a separate investment in trust, or the exclusion of the *jus mariti.* A contingent debt in her favour is constituted, on which she can claim; and in this particular the wife is more favoured by our law than that of England; but still the debt is merely personal (*b*). (2.) The insolvency of the husband at the period of the marriage is said to affect the provision, so as to restrict the claim of the wife to a moderate allowance; but this seems to be limited to claims for provisions in the contract of a second or other subsequent marriage in competition with the children of a former marriage, or when the provision (being in a first contract) is manifestly exorbitant and unsuitable (*c*).

2. *Right of retention.*—(1.) The wife has, in peculiar circumstances, an available right of preference in implement of her part of the contract, over funds belonging to herself or a relation, which are intended for the hus-

band, and which, although thus truly part of the goods in communion, have not been immixed with the husband's effects. This claim arises in the nature of a mutual contract, wherein the consideration is the reciprocal obligations of the parties, which imply the willingness and ability of either party to perform the stipulations incumbent on him, to be entitled himself or to communicate a right to creditors to demand implement by the other. (2.) Thus, where the tocher has not been paid over to the husband, retention may be maintained or a preference claimed in security of the wife's annuity or other prestations (*d*). At least, it has been held that arresting creditors must find caution to the extent of the wife's interest in the fund (*e*). (3.) The principle affects likewise a bond assigned to the husband under the condition that on payment he should invest a sum to answer the wife's annuity, and gives a preference over the contents in the hands of the debtor (*f*); but it is excluded when the conveyance is absolute, either in the contract, or, there being no contract, through the legal assignation implied in marriage (*g*); or by the stipulated security being provided, although it should afterwards be waived by the wife (*h*). Nor does it apply to legal provisions, which are a consequence of the marriage itself and independent on conventional agreement (*i*), or operate in favour of the deceased wife's next in kin, who have no claim to a share of the goods in communion in a question with creditors (*k*); although it has been applied to the effect of enforcing infeftment in favour of the heir of the marriage, in implement of a stipulation in the contract (*l*). (4.) Sums falling due to the wife during the marriage have not been considered subject to the claim, at least when such funds are not referred to in the contract (*m*); but, from an opinion recently expressed, it would appear to apply to other

funds than the tocher, if the property of the wife prior to the marriage, and remaining unpaid (*n*).

3. *Forms of provisions.*—A provision by the husband may be conceived in various forms. The most usual are by an obligation to invest a sum on good and sufficient security in favour of the wife in liferent, and the children in fee (*o*), or to pay an annuity to the wife in the event of her survivance (*p*).

(*a*) In contemplation of which marriage and in consideration of the conveyance and assignation after written the said A. binds and obliges him his heirs executors and successors betwixt and the day of next to lay out and secure the sum of L. sterling on good and sufficient security either heritable or moveable bearing interest and to take the rights and securities thereof to himself and the said B. and the survivor in conjunct fee and liferent for her the said B.'s liferent use only and to the child or children of the said intended marriage and the issue of the bodies of such child or children as representing their parent in manner after mentioned whom failing to the said A.'s own heirs and assignees whomsoever in fee and as often as the said sum or any part thereof shall be uplifted the said A. binds and obliges himself and his foresaids to re-invest and again secure the same as above expressed.

(*b*) Bell, Com. 1. 637.

(*c*) See Bell, as in (*b*); Duncan, 8th Feb. 1785, M. 987; M'Lachlan, 29th June 1824, S. 3. 192.

(*d*) Ersk. 3. 3. 86; Lothian, 29th July 1724, M. 4390; Creditors of Watson, 9th June 1738, M. 9196, and cases cited; Creditors of Hope, July 1732, M. 9195; Munro, 14th Jan. 1761, M. 9200.

(*e*) Crawford, 22d June 1743, M. 8266, 9140; Buchanan, 6th March 1787, M. 9201.

(*f*) Haddington Manufactory, 20th Jan. 1781, M. 9144.

(*g*) Haddington Manufactory, as in (*f*); Cowan, 30th Nov. 1733, M. 9142; Lee, 1st Dec. 1795, M. 5889.

(*h*) Barham, 27th July 1734, Elch. *Mutual Contract*, 2.

(*i*) Murray's Crs. 11th Dec. 1744, M. 5918.

(*k*) Johnston, &c. 14th July 1755, M. 997; Angus, 3d August 1758, M. 4882.

(*l*) Sutherland, 5th Feb. 1724, M. 9138.

(*m*) Greenhill, 24th June 1824, S. 3. 169.

(*n*) Lord Glenlee, in Rollo, 28th Nov. 1832, F. C., S. 11. 132.

(*o*) See clause in (*a*).

(p) In contemplation of which marriage and in consideration of the provisions herein-after granted in his favour by the said B. the said A. hereby binds and obliges himself and his heirs executors and successors whomsoever renouncing the benefit of the order of discussing them to make payment to the said B. his promised spouse if she shall survive him during all the days of her lifetime after his decease of a free yearly annuity of L. sterling exempted from all burdens and deductions whatever and that at two terms in the year Whitsunday and Martinmas by equal portions in advance beginning the first term's payment of the said annuity at the first of these terms which shall happen after the death of the said A. for the half year succeeding the said term the next term's payment at the first term of Whitsunday or Martinmas thereafter and so forth half-yearly termly and continually during all the days of the life of the said B. with the legal interest of each term's payment of the said annuity during the not payment and a fifth part more of each term's payment of liquidate penalty in case of failure in the punctual payment thereof.

92. PROVISION IN LIFERENT AND FEE.—1. *Principle of construction.*—The general principles and forms which regulate the rights of the spouses and children, under a conveyance in conjunct fee and liferent, appear to be the same in destinations, whether of heritage or moveables, although they are occasionally modified by the nature of the subject and the intention of parties. From the artificial structure and technical meaning of clauses of this nature, it is of much practical importance to have a clear notion of the import of particular expressions, so as to avoid the use of terms which may involve difficult questions of construction.

2. *Conveyance to the spouses and their heirs.*—(1.) A destination of a sum of money to A. and B., *spouses, in liferent*, or *in conjunct fee and liferent*, or *for liferent use*, or equivalent terms, and *to the heirs or children of the marriage in fee, whom failing, to the heirs of the spouses*, are sufficient, in all cases, to give a liferent to the wife on her survivance, and the fee to the children, if any shall survive, and the fund have been preserved for them (a); but the source from which the fund is derived has an influence on the intermediate situation of the fee. If it

flow from the husband, or come with the wife as tocher, the fee is in the husband (*b*). On the other hand, if the subject, whether flowing from the wife's father, or any other relation, was not given as tocher, but for love and favour, the presumption is in favour of the wife's right of fee (*c*). Other circumstances, such as a power of disposal to the wife or husband, may control the destination (*d*). (2.) Where, again, there is a substitution, after the heirs of the marriage, of the heirs of one of the spouses, and no ulterior destination, it seems to be clearly ascertained that this conception of the clause turns the presumption in favour of such spouse (*e*). (3.) But if intermediate substitutions occur, the case is one of much difficulty. Craig and Stair are favourable to the right of the spouse whose heirs are last in the substitution, whereas Erskine expresses a contrary opinion; and the decided cases do not resolve the doubt (*f*). The question thus becomes one of circumstances, and a careful review of the authorities is necessary. (4.) Where the destination of a moveable subject is in favour of A. and B., *and the longest liver, in liferent, and their heirs*, and children of the marriage do not survive, the wife's heirs have been held entitled, on her predecease, to a half, subject to the husband's liferent, the husband retaining the fee of the other half,—a result which supposes an equal right in the spouses (*g*). (5.) The destination being *to the spouses and the survivor or longest liver in conjunct fee and liferent, and their heirs*, the old interpretation was in favour of the husband and his heirs failing children of the marriage (*h*); and although more recent authorities interpret the clause as if the words were *to the heirs of the survivor* (*i*), it cannot be considered free from the influence of specialties, as showing intention (*k*). By a conjunct infeftment to A. and B., and the longest liver, without expressing heirs, there is, according to Stair, no more than a liferent conferred on

the spouses, so that the fee would remain in the person of the disponer (*l*); but the application of the rule, even to a feudal right, may now perhaps be considered doubtful; much more is it so in regard to a sum of money, which would probably belong, under such terms, to the longest liver in fee. (6.) It is plain, from the authorities referred to, that the powers of such clauses are in most instances judged of by mixed considerations, derived partly from intention, and partly from the technical structure of each individual clause. The *practical rule* thence to be derived would lead the conveyancer to exclude construction and combine those elements of interpretation, by expressing intention in well-ascertained technical language. Thus, if it is intended that a sum of money, from whatever source it may be derived, shall belong, on the dissolution of the marriage by death without issue, wholly to the survivor of the spouses, the terms may be, *to A. and B., spouses, in conjunct liferent, for their liferent use allenarly, and to the heirs of the marriage, whom failing, to the survivor of the said A. and B., and the heirs of the survivor, in fee.* When, again, the purpose is to give the fee to the heirs-general of one of the parties, this will be accomplished by the terms, to *A. and B., spouses, in conjunct liferent, for their liferent use allenarly, and to the children of the marriage, whom failing, the heirs of the said A. (or B.) in fee.* The following words will give the fee, failing children of the marriage, equally to the spouses, and their heirs-general; to *A. and B., spouses, in conjunct fee and liferent, (or conjunct liferent,) for their liferent use allenarly, and the children of the marriage in fee, whom failing, to the said A. and B., equally between them, and their heirs.* In these examples it is assumed, as necessary to the supposed result, that there are no children of the marriage to take the provision, as well as that the fund has been secured for the purposes of the destination.

3. *Conveyances to the spouses and children.*—The terms referred to in the concluding part of Art. 2 relate in so far to the children of the marriage, that they confer on them a right of fee on their coming into existence, the father having, in the meantime, a fiduciary fee for their behoof. But the particular forms by which a right of fee, or a mere *spes successionis* to the children, may be expressed, need not be repeated here (*m*). It is sufficient to state the practical result. A right of fee in the children (a fiduciary fee remaining in the father for their behoof, and a right of liferent belonging to the spouses and the survivor of them) is conferred by the terms to *A. and B., spouses, in conjunct fee and liferent,* (or *in conjunct liferent,*) *for their liferent use allenarly or only, and the children of the marriage in fee;* and, on the other hand, a mere *spes successionis* is conferred on the children by the terms, to *A. and B., spouses, in conjunct fee and liferent,* (or *in conjunct liferent,*) *and the heirs and children of the marriage in fee;* or, *in conjunct fee and liferent, for the liferent use only of the said A., (or B.,) and to the children of the marriage in fee.* In these examples, the fee in the one case is in the husband, and in the other in the spouse whose liferent is not restricted by the term *allenarly* or *only,* which is thus the qualifying word. These are the usual and formal modes of expressing intention; but there are other means of limiting the right of the father, which have been sustained as effectual (*n*).

(*a*) Stair, 2. 6. 10; Ersk. 3. 8. 36.

(*b*) Stair, 3. 5. 51; Ersk. as in (*a*), and note (by Ivory) 442; Watson, 22d July 1766, M. 4288, B. S. 5. 927, Hailes, 82; Blair, 5th Aug. 1782, M. 2280.

(*c*) Stair, as in (*b*); Ersk. as in (*a*); Gray, 25th Feb. 1773, M. 4210; Paterson, 6th Dec. 1780, M. 4212, and auth. cit.; Robertson's Crs. 9th Dec. 1795, M. 4491. See Muirhead, 16th Jan. 1824, S. 2. 617.

(*d*) Ersk. as in (*a*). See Riddells, 5th Nov. 1747, M. 4203, 14,678, Elchies, *Fiar*, 8. The subject was moveable.

(*e*) Ersk. as in (*a*); Wordie, 18th July 1750, M. 4207, Elch. *Fiar*, 10; Sinclair, 20th Nov. 1771, M. 4241, Hailes, 450.

(*f*) Craig, 2. 22. 6; Stair, 3. 5. 51; Ersk. as in (*a*). See Angus, June 1733, M. 4244, where the destination was of a sum of money; Bruce Henderson, 20th Jan. 1790, M. 4215, affd. on ap. 11th May 1791.

(*g*) Ersk. 3. 8. 36; Bartilmo, 2d Feb. 1682, M. 4222.

(*h*) Stair, 2. 6. 10.

(*i*) Ersk. as in (*g*); Riddells, 6th Nov. 1747, M. 4203; Boyd, 22d Nov. 1749, M. 4205.

(*k*) See Murray, 19th May 1826, F. C., S. 4. 589; M'Gregor, 3d June 1831, S. 9. 675.

(*l*) Stair, as in (*h*,) *in fine*.

(*m*) See Bell, Pr. 1596, *et seq.*; Duff, Feud. Conv. § 295, *et seq.*

(*n*) References in (*m*).

93. PROVISION BY ANNUITY (*a*).—By this form of provision the wife, in the event of her survivance, acquires a right to a certain yearly payment or jointure out of the estate of the husband. Under a clause in the terms expressed in the notes, the annuity, it may perhaps be maintained, will expire at the first term preceding the death of the annuitant. This has been expressly found in relation to an annuity secured over land, although, in the personal obligation, the annuity was declared to be payable to the annuitant *termly and proportionally*, and *during all the days of her life*; but the Court seem to have in some measure been influenced by the consideration, that the omission in the obligation to infeft of the word *proportionally* qualified the obligatory clause. The circumstances came thus to approach nearly to those of a prior case, where an annuity due by personal bond granted for a fixed purchase price, and declared to be payable *termly*, (not also *proportionally*,) was in like manner held to have expired at the term immediately preceding the period of the annuitant's death (*b*). Although the clause under consideration does not essentially differ from that which, in the instance first above noticed, was the subject of discussion, for *continually* seems to have as broad a

meaning as *proportionally, during all the days of her life*, a doubt may exist whether the determination in the case of Colbrooke, as involving a specialty, is to be regarded as conclusive on the question of construction. Still it may be argued, that because an annuity of this nature is not payable as the interest of a particular sum or capital stock, but without reference to the source from whence it is derived, and the words *yearly*, *termly* and *continually* occur after the mention of specific terms of payment, the word *continually* ought to be held as referring not to days, (as in the case of the interest of money, which is due *de die in diem,)* but to the whole period of the annuitant's existence. And although the ratio of the decision in the case of Colbrooke seems, on the contrary, to favour a literal interpretation of the word *continually*, where there are no expressions in the deed sufficient to qualify its meaning, it is recommended to insert the term *daily* before *continually*, and a declaration that the annuity is for the alimentary use of the widow, in order to remove all doubt in the construction of the clause.

(*a*) See note (*p*), § 91.

(*b*) Craig *v.* Colbrooke, 14th May 1835, F. C., S. 13. 756; E. of Dalhousie, 19th June 1789, M. 15,915.

94. MUTUAL CONVEYANCE.—1. *Effect as regards the parties and their heirs.*—An example of a clause, by which the husband and wife settle their whole property on themselves in liferent only, and the children to be procreated of the marriage, whom failing, to the survivor of the spouses and the heirs of the survivor in fee, is given in the notes (*a*). (1.) A mutual destination of the *universitas* is analogous to a conveyance of conquest, and does not take the fee out of the husband, which he may dispose of for onerous causes. (2.) It affects only the goods in com-

munion at the dissolution of the marriage (*b*); a rule which maintains even where, by the terms of the destination, the mutual property of the spouses is, in a certain event, which can only occur after the death of the husband, (such as the second marriage of the widow,) destined to the heirs of the husband. Thus, a legacy bequeathed to the wife, but not her vested property prior to the husband's death, was held excluded from the scope of a conveyance, which the nature of the contract plainly restricted to the period of the connection, although terms were employed which conveyed generally all property that *should at any time hereafter* belong to the spouses (*c*). (3.) The terms of a ~~general~~ universal conveyance must be either so comprehensive as to embrace the estate as a whole, or so particular as to describe every kind of moveable subject. Thus, the terms *goods* and *gear* do not comprehend *debts*, unless the deed contain other expressions sufficient to enlarge their ordinary meaning by a clear indication of intention. In this particular a general conveyance of goods and gear *that shall belong to the spouses at the dissolution of the marriage*, has a different meaning from *goods and gear that shall be acquired during the marriage*. The former are descriptive of moveables of a special kind existing at a particular period; whereas the latter comprehend whatever acquisitions shall bear that character at any time during the subsistence of the marriage. And thus it was held, that under a conveyance of the conquest of all *lands*, *annualrents*, *goods* and *gear*, the wife had a right to moveable bonds bearing date while the marriage subsisted, provided she could show that they were granted for sums acquired during the marriage (*d*).

2. *Effect of a substitution of third parties* (*e*).—It may happen that the parties wish to combine the purposes of a *mortis causa* settlement with those of the marriage-contract. Thus, it may be intended to favour the re-

lations of both or either of the spouses in the event of no children existing of the marriage. In such cases a mutual conveyance for reciprocal considerations, whether ante or postnuptial, is regarded as an onerous settlement, and gives the substitutes a right which, although defeasible by the joint revocation of the spouses, cannot be affected by the gratuitous act or deed of the survivor, whether *de præsenti* or *mortis causa*. But as the power of disposal belongs to the survivor, and is, indeed, usually in express terms reserved, the subjects may be wholly or partly alienated for onerous causes, and they continue under the ordinary administration of the survivor (*f*). The rule applied in an early case relied on by Stair has thus been departed from (*g*).

(*a*) In contemplation of which marriage the said A. and B. with and under the conditions and declarations under written do hereby with mutual advice and consent ASSIGN and DISPONE to and in favour of each other and the survivor in liferent for our joint liferent and the survivor's liferent use only and the child or children to be procreated of the marriage in fee whom failing to the survivor's heirs or assignees whomsoever also in fee ALL and SUNDRY goods gear corns cattle horse nolt sheep household furniture and plenishing including plate and wines debts sums of money and all other moveables whatsoever including heirship moveables (*or as more comprehensive* All our moveable means and estate of every denomination heirship moveables included) now belonging or due and addebted or that may belong and be due and addebted to us or either of us at the time of the dissolution of the said intended marriage in any manner of way with the vouchers grounds and instructions thereof and all that has followed or is competent to follow thereupon.

(*b*) See Burden, 27th April 1738, in H. of Lords, Cr. and St. 214.

(*c*) Aytone, 17th Feb. 1814, F. C.

(*d*) Robson, 15th July 1673, M. 3050. See Ersk. 3. 3. 30, and note, (by Ivory,) 136. The error in the text, pointed out by the learned editor, seems to have arisen from a misapprehension of the meaning of the words, *after the marriage*, which plainly import after the constitution, not after the dissolution, of the marriage.

(*e*) See note (*a*).

(*f*) Mitchell, 16th June 1676, M. 3190; Tait, 20th July 1738, M. 7728;

Woods, 4th Dec. 1823, F. C., S. 2. 549. The deed of alteration here was a postnuptial contract of a future marriage, by which the husband's whole property was conveyed to his second wife, and which, excepting to the extent of a moderate provision to the widow, was held ineffectual, as regarded the subjects in the mutual settlement, as being gratuitous. But a different result would probably have followed had the contract been antenuptial. See Anderson, 27th Jan. 1837, F. C., D. 15. 435.

(*g*) Stair, 2. 3. 41; 3. 5. 19; Anderson, 21st Dec. 1680, M. 12,890. Here a conveyance to a child of a future marriage was sustained, as effectual to alter the destination of part of the conquest to the heirs of the wife of the first marriage.

95. PROVISION IN THE EVENT OF INSOLVENCY.—The form suggested in the Juridical Styles for giving the wife a *jus crediti* is exemplified below (*a*).

(*a*) And the said A. binds and obliges himself and his foresaids to make payment to the said B. during the subsistence of the said intended marriage of the free yearly sum of L. sterling for her aliment only and that at two terms in the year *(and so on as in the common case, making the payment to commence immediately so as that the obligation may always be unconditional.)* And to secure the regular payment of the said yearly sum of L. sterling the said A. binds and obliges himself and his foresaids whenever required by the trustees in whose names it is herein-after stipulated that execution shall pass for implement of the provisions herein contained in favour of the said B. to make payment to them of the sum of L. sterling to be invested by them on good security for payment of the yearly interest thereof to the said B. during the subsistence of the said intended marriage and until the provisions above stipulated at the dissolution thereof in favour of the said B. shall become payable declaring that the said yearly sums and interest shall be alimentary only &c.

96. MODES OF SECURING THE WIFE'S PROVISIONS.—By the form of provision noticed in § 91, the wife has a claim only on the husband's estate on his predecease. A widow has no preference for her jointure over her husband's creditors, although holding merely personal obligations: she ranks according to her diligence (*a*). In order to give the utmost protection which the law affords, a capital sum must be invested in sufficient security, and taken payable

to trustees on her behalf. A less degree of security is obtained by the exclusion of the husband's *jus mariti*. (See *Conveyance by the Wife*.) Again, if the provision is by way of aliment in the event of insolvency, it is recommended in the Juridical Styles as the most eligible course, to take the husband bound in the contract to pay to the wife a specific sum in name of aliment having effect *de præsenti*, and to empower trustees to enforce the investment of an adequate sum for producing the annuity; (above, § 95.) An antenuptial provision for aliment, duly set apart for the wife, and payable to herself, is valid in a question with creditors; but, after marriage, a provision of this kind cannot be constituted so as to exclude the presumption of fraud, unless in a contract of voluntary separation followed by the complete non-intercourse of the parties (*b*). It may be observed, however, that any course is attended with risk by which the investment is postponed; since delay necessarily implies that the trustees are to exercise a discretion, which may end in their duty being neglected until the husband's insolvency has made it impossible to perform it. The clause recommended in the Style Book will in that event give a right to compete with creditors, but not an absolute preference. At the same time it must be confessed, that a clause or investment of this nature ought only in very special circumstances to be employed, unless with reference to the wife's separate property (*c*).

(*a*) Bell, Com. 1. 637; Keith, 7th Feb. 1688, M. 11,833; Allan, 19th Feb. 1713, M. 11,835.

(*b*) See M'Gregor, 22d Jan. 1820, F. C. See Bell, Pr. 1944, where it is said that such a separate provision may be made from the husband's funds, even after marriage, if he be solvent at the time. But the case relied on, (Dickson, 3d Feb. 1705, M. 10,396,) seems to relate to an antenuptial arrangement.

(*c*) See Bell, as in (*a*); Jurid. Styles, 1. 210, *et seq.*

97. PROVISION OR OBLIGATION BY A RELATION OR CAU-

TIONER (*a*).—When the father or other relation of the spouses, or either of them, joins in the contract as cautioner for the performance of stipulations, he will bind himself expressly as such, with reference to the specific obligations undertaken by him. (See *Provisions to Children.*) (1.) A general obligation by a father in the introductory clause of the contract, as burden-taker for his minor son, has been held not to impose liability on him as cautioner for the implement of particular stipulations, as he thus joins in the contract only *tutorio nomine;* but where he also bound his heirs, the obligation was construed to be personal (*b*). (2.) An obligation by a father to pay a sum of money to the spouses or their children is an onerous obligation, and effectual in competition with the father's creditors when, by competent words of style, a *jus crediti* has been conferred on the parties (*c*). Even when not payable until after the death of the father, it is valid in questions with his creditors, if granted in lieu of the renunciation by the husband or wife of family provisions or debts owing by the father (*d*).

(*a*) And to enable the said A. to implement the obligations made by him the said F. BINDS and OBLIGES himself his heirs executors and successors whomsoever to content and pay to the said A. his son and his heirs executors or assignees the sum of L. sterling in manner following viz. L. thereof at the term of Whitsunday next and the remaining L. thereof at the first term of Whitsunday or Martinmas after the death of the said F. with a fifth part more of each of the said portions of L. in name of penalty in case of failure in the punctual payment thereof And the said F. farther BINDS and OBLIGES himself and his foresaids that the said sum of L.2000 so to be advanced and paid by him shall be invested in good security in terms of the obligation hereby undertaken by the said A. in the first place for the liferent (or annuity *as the case may be*) provided to the said B. and in the second place for the said children in fee as before written all to the satisfaction of the persons in whose name it is herein stipulated that execution shall pass And which obligation hereby undertaken by the said F. the said A. and B. accept in full satisfaction of all that they or either of them or the issue of their marriage could ask or claim in any manner of way whatever through the death of the said F. or of G. his spouse.

(b) Gray, 2d Dec. 1724, M. 2270; Keir, 14th Nov. 1679, B. S. 3. 435.

(c) Bell, Pr. 1968, *et seq.*; Duff, Feudal Convey. § 312. 6.

(d) Gordon, 9th Feb. 1833, F. C., S. 11. 368. See note of Lord Moncreiff, and auth. cited.

98. SUBSIDIARY STIPULATIONS IN RELATION TO THE WIFE'S PROVISIONS.—1. *Obligation on the husband to pay a premium of insurance* (a).—This form contains a power to trustees in their order to enforce the obligation. It is assumed that the insurance has already been effected, and the form ought in addition to contain a trust-conveyance of the policy for the wife's behoof in liferent, and, according to the agreement of parties, in fee. It is, however, to be observed, that in the event of the husband's bankruptcy, the premium will not be a preferable debt unless secured heritably or otherwise.

2. *Clause to prevent renunciation by the wife.*—The inconvenience and distress attending the renunciation by the wife of her provisions under the contract ought to be prevented, by excluding the power of restriction or renunciation during the marriage without the consent of third parties,—a form of which has been sustained as effectual (b); or the desired object may be accomplished by an antenuptial trust, which, when duly constituted, is irrevocable by the joint deed of the spouses (c).

3. *Restriction of the wife's provision in case of children* (d).—A restriction is unusual in this event, unless with reference to a very numerous family. The most eligible form is by burdening the wife's annuity with a certain yearly payment to the children, which they can accept without representing their father; and the provision thus made in their favour will have the same preference as against the father's creditors, as the annuity itself of which it forms a part; for a restriction of the annuity thus accomplished is regarded not as an extension of the husband's right of

fee in the capital sum, but in the light of an obligation on the wife to aliment the children of the marriage (*e*).

4. *Restriction in the event of the wife's marrying again.*—This restriction is not unusual, for the notion of Balfour, in treating of the dowry or terce, that it was given to the wife, "to the effect that gif it happen her husband "to deceas before her, she may the mair easily be marryit "with ane uther man," does not seem greatly to influence husbands in providing their wives. The restriction may be made absolutely, or, as in the event expressed above, (Art. 3.) by burdening the jointure in favour of the children of the first marriage (*f*).

(*a*) IN CONTEMPLATION of which marriage the said A. binds and obliges himself and his heirs executors and successors to make payment to L. whom failing to M. whom failing to N. whom all failing to the nearest heir-male of the last survivor of them who shall be major and resident within Great Britain and who shall accept as sole trustee for the purpose after mentioned of the sum of L. sterling being the annual sum ascertained to be requisite for the purpose after mentioned at the term of yearly beginning the first term's payment of the said sum at the term of next and thereafter to make payment thereof yearly at the said term during all the days of the said A.'s life with the legal interest of each term's payment from the time at which it falls due and till payment and a fifth part more of each term's payment of liquidate penalty in case of failure but IN TRUST always in order that the said trustee acting for the time may pay annually to the insurance company the premium of insurance on a policy on the life of the said A. to be effected with the said office and which policy the said trustee is hereby instructed and empowered to effect accordingly in his own name as trustee foresaid for the sum of L. sterling the said trustee for the time being bound to report regularly to the said A. the receipts of the office for the said premium.

(*b*) Jurid. Styles, 2. 215; Murray's Trs. 5th Feb. 1745, M. 2273, 5842. This case related to heritage, but the principle is equally applicable to moveables.

(*c*) Anderson, 2d June 1837, F. C., D. 15. 1073. See below, *Renunciation of jus mariti.*

(*d*) BUT with and under this condition and provision always that if any child or children of the said intended marriage or their lawful issue shall exist at the dissolution thereof by the death of the said A. then the said B. shall after that event be bound and obliged as she hereby binds and obliges her-

self to apply the sum of L. yearly out of the foresaid liferent (or annuity) to the maintenance and education of the said child or children or their issue (or the payment may be proportioned to the number of children.)—See a clause in Jurid. Styles, 2. 216, where this payment is made contingent on the insolvency of the husband *before* or at the time of his death. But a restriction *prior to* his death is inconsistent with the assumed event which is to cause the restriction, viz. the existence of children at the dissolution of the marriage. And it seems more advisable to make the restriction absolute in the event supposed, and declare it to be for the benefit of the children.

(*e*) Crs. of Kinminity, 20th Jan. 1756, M. 6127. (*Clause.*)—PROVIDED always likeas it is hereby specially provided and declared that in case there shall be heirs-male of the said marriage then and in that case the said Mary Sutherland shall be bound and obliged as by the acceptation hereof she binds and obliges her to pay yearly to the said heir-male and failing of him to the heir-male of his body allenarly but to none of the said Alexander Sutherland his other heirs the sum of 200 merks Scots money and two chalders of meal or the price of the said two chalders in money conform to the fiars of the Commissariat of Murray in the option of the said Mary Sutherland.—See below, note (*f*). Blairs, 5th Aug. 1782, M. 2280.

(*f*) Crs. of Kinminity, as in (*e*). (*Clause.*)—AND FURTHER if it shall happen the said Mary Sutherland to marry another husband after the said Alexander his decease then and in that case she binds and obliges her to pay yearly to the said heir-male and to the heirs-male of his body but to none of the said Alexander his other heirs the sum of 100 merks and one chalder &c. with the payment of which money and victual in the respective events aforesaid (*above, note* (*e*,)) the said liferent lands and this present right are burdened.

99. PROVISION OF CONQUEST (*a*). — The nature of a provision of conquest, and the rights of the spouses and children in reference to it, are explained elsewhere (*b*). Where the conveyance, on the one hand, is meant to be limited to the subjects properly falling within the conquest, and on the other is to include all that is embraced by that term, it is advisable to employ the generic term *Conquest;* for a descriptive clause may occasion the omission of subjects not intended to be excluded. Thus, a provision of the conquest of *lands*, *annualrents*, *goods* and *gear*, does not embrace bonds, although bearing date whilst the marriage

subsisted, unless it can be shown that they were granted for sums or moveables acquired during the marriage (*c*).

(*a*) AND FURTHER the said A. binds and obliges himself over and above the said sum of L. to provide the half of the whole heritable and moveable property and funds that he shall conquest and acquire during the said intended marriage by purchase succession or otherwise after deduction of the debts due by him to the foresaid B. in liferent for her liferent use only in case she shall survive him and the whole of the said conquest to himself and the child or children of the said intended marriage and the issue of their bodies as aforesaid in fee and that the extent of the said conquest may the more easily be ascertained it is hereby declared that the funds and effects presently belonging to the said A. amount in money and value to the sum of L. (*It may be necessary also to make a similar estimation of the wife's property.*)—In the event of no children existing at the dissolution of the marriage, the wife is sometimes provided in the liferent of the whole conquest. But a specific provision is more advisable.

(*b*) Bell, Pr. 1974, *et seq.*; Duff, Feud. Conv. § 307.

(*c*) Robson, 15th July 1673, M. 3050; Note (by Ivory,) Ersk. 3. 3. 30.

100. PROVISION OF FURNITURE.—See, in regard to the terms necessary for expressing a conveyance of moveables, above, § 66. (1.) These terms are in the ordinary case equally applicable to deeds of settlement and marriage-contracts; but as the latter bear a more comprehensive construction than simple testaments, which are not suited to a conveyance of heritage, the word *moveables* in a contract may import *heirship moveables*, in circumstances where this interpretation would be rejected in a testament (*a*); and thus the term *furniture* may likewise be considered as more comprehensive in the one kind of deed than in the other. (2.) Furniture, in its ordinary sense, seems to be exclusive of books, and is said not even to comprehend wines; above, § 66. (3.) A provision of furniture confers no preference over other creditors, but is ranked according to the nature of the diligence done to render it

effectual (*b*). (4.) The more eligible course is to provide a sum in lieu of furniture (*c*).

(*a*) Kier, B. S. 3. 435. See Ersk. 3. 3. 30, 3. 9. 11, and auth. cited; Bell, Pr. 1885, and auth. cited; Traquair, 12th March 1562, M. 5389; Boswell, 18th Nov. 1737, M. 5916.

(*b*) Forbes, 25th June 1714, M. 11,850.

(*c*) AND FURTHER the said A. binds and obliges himself and his foresaids to make payment to the said B. at the term of Whitsunday or Martinmas next after his death of the sum of L. sterling in lieu of household furniture with the legal interest of the said sum from the said term of payment thereof during the not payment and a fifth part more of liquidate penalty in case of failure, &c. Or the furniture itself, or a proportion of it, may be conveyed.

101. MOURNINGS AND INTERIM ALIMENT (*a*).—1. *Mournings.*—(1.) These are regulated by the quality of the husband, and are due when his estate or rank requires mournings in point of decency, not as a provision to the wife, but as part of the husband's funeral expenses. Therefore the claim against the husband's representatives is not contingent on the subsistence of the marriage for a year and day (*b*). It appears, for a similar reason, to be a preferable or privileged debt in a question with creditors (*c*); and although a different rule was, in an earlier case, applied to a claim for a widow's mournings, where the marriage was dissolved within the year (*d*), its authority is considered to be superseded by the more recent decision, as founded on the general principle, although, in this case, the marriage had subsisted for year and day (*e*). (2.) A claim for the price of mournings, as being part of the funeral expenses, is not excluded by the wife's acceptance of a provision made in her favour by the husband in a *mortis causa* deed, in lieu of all *that she could anywise ask or claim in and through his decease, any manner of way, excepting the heirship moveables, household furniture and plenishing, in terms of the marriage-contract.* This express

provision was held to come in place only of the jointure fixed by the contract; but there occurred this specialty, that in the contract there was an express reservation of aliment and mournings from the wife's discharge of her legal provisions (*f*). (3.) The contract will regulate the amount where the claim is thereby limited; although it is not to be assumed that an exorbitant allowance on this head would be sustained in a question with creditors.

2. *Interim aliment.*—The amount of the widow's claim for aliment till the term succeeding the period of the husband's death depends, when not regulated by the contract, on the quality and fortune of the husband and the number of servants left by him in his family when he died (*g*). The claim does not appear to be privileged in a question with creditors (*h*). As being an allowance for the maintenance of the family, it is not barred by the wife's acceptance of a provision in lieu of the jointure settled on her by the contract of marriage in full of her legal provisions (*i*).

(*a*) AND FURTHER the said A. binds and obliges himself and his foresaids to make payment within three months after his death to the said B. if she shall survive him of the sum of L. sterling as an allowance for her mournings with a fifth part more of penalty in case of failure and the legal interest thereof from the said term of payment during the not payment thereof AND FURTHER to make payment to her at the rate of L. sterling per annum for the time that shall have to run from the day of his death to the term of Whitsunday or Martinmas thereafter which shall first arrive as the expense of maintaining the family and for house rent and servants' wages to that term and which aliment shall be paid to her at the same time and under the like penalty with the allowance above provided for mournings and shall bear like interest during the not payment WHICH SUMS the said B. accepts in full of all she can claim in name of mournings or interim aliment.

(*b*) Ersk. 1. 6. 41; Gordon, 19th Feb. 1743, M. 6161.

(*c*) Sheddan, 13th May 1802, M. 11,855.

(*d*) Nielson, 21st Nov. 1776, M. 6165.

(*e*) Bell, Com. 1. 634; Ersk. 1. 6. 41, and note (by Ivory) 174.

(*f*) Rennie, 16th May 1800, M. App. *Presumption*, No. 4. See Garden, 19th Feb. 1743, M. 2271.

(g) Ersk. 1. 6. 41, and note (by Ivory) 173.

(h) Ersk. as in (g); but see Jurid. Styles, 2. 219.

(i) Rennie; Garden, as in (f).

102. DECLARATION IN REGARD TO PROVISION FROM A SEPARATE SOURCE (a).—This clause is commonly introduced to exclude any question as to the right of the wife to receive both the provisions in the contract, and any annuity she may be entitled to from a separate source, such as the statutory provision of a widow of a clergyman of the Church of Scotland. But a clause of this nature seems superfluous.

(a) AND which provisions hereby made in favour of the said B. are hereby declared to be over and above the annuity to which she will be entitled if she survives the said A. as his widow from the widows' fund of . . or any other annuity or provision to which she may be entitled from any similar fund.

103. ACCEPTANCE BY THE WIFE (a).—(1.) *Must be express.*—The discharge of the *jus relictæ* is not presumed by the wife's acceptance of a conventional provision, as is that of the terce, which is in such case excluded by special statute confirmatory of our ancient law (b). This legal provision of a third of the free moveables (or a half when no children of the father exist) belongs absolutely to the wife, so that nothing less than a renunciation, or at least the acceptance of a conventional in lieu of the legal provision, can divest her of it, or, in the event of her predecease, affect the right of her next of kin. Such renunciation, it would appear, must be express; and this is the form which the conveyancer ought to employ. The plea of implied renunciation had indeed, in one instance, been sustained, where the intention of the parties, as explained by the extent and nature of the conventional provisions for the wife, was held to be manifest from the terms of the contract (c); but, in a more recent and well-considered case, the point was determined on the general principle, and placed on a prac-

tical footing. It was held that the *jus relictæ* can only be excluded by an express clause, or, in as far as special subjects are provided by the contract; and thus the free estate, out of which the legal provision is due, is limited, as well by the provisions made to the wife herself, as by those declared in favour of others, to which, as a party to the deed, she has consented. The conquest, for example, when destined to the children of the marriage, is deducted from the estate as a debt, before the *jus relictæ* comes to be estimated (*d*). In later instances, a contrary result is to be attributed to homologation on the part of the wife in accepting and enjoying a special provision (*e*). (2.) The right to interim aliment and mournings is not affected by a renunciation of the *jus relictæ;* (above, § .101.) (3.) Although a clause in the antenuptial contract is the proper form for renouncing the legal provisions, they may be discharged during marriage, even in a contract of separation; but in these cases the wife's discharge is subject to revocation during the subsistence of the marriage, or by herself, (although not by her representatives,) after the husband's death, where considerable inequality exists in the arrangements. The rights discharged by the wife are, in so far as their value exceeds the provision accepted in lieu of them, regarded as a donation on her part to the husband; and, if the excess be large, the equitable remedy of revocation is open to her. (See *Postnuptial Contract.)* (4.) It is not essential that the wife's acceptance should be proved by her subscription of the deed or contract, (although it is a practical rule that she shall thus evidence her consent,) or even in writing (*f*). (5.) Acceptance by the wife of a legacy or provision contained in a *mortis causa* settlement does not, in the ordinary case, discharge her legal rights; but when such acceptance is plainly intended by the testator to have that effect, the widow must choose between the legal and voluntary provisions; (above,

§ 64. 3.) (6.) The settlement of the widow's provisions by antenuptial contract excludes any claim for additional aliment,—a claim otherwise competent when the legal provisions of terce and *jus relictæ* are inadequate (*g*).

2. *Terms of acceptance.*—(1.) When competent provisions are made in her favour, a clause of acceptance or renunciation by the wife of her legal rights is liberally interpreted, from the presumed intention of parties that the discharge is meant to be total. Thus, the acceptance by the wife of provisions in full of all terce of lands or annualrents, third or "half of moveables, conquest, and all "others she, her executors or nearest of kin, could claim," was interpreted to be a total discharge, applicable to the event of the predecease of either spouse, although there were added the words, "by and through the decease of "the said G. L., any manner of way, excepting his good "will only." The former branch of the clause clearly comprehended the claim of the executors of the wife on her death, and was held not to be controlled by the latter, although referring solely to the death of the husband (*h*). A similar construction was given to a clause still more loosely framed, but which contained the general term *moveables* in its principal branch (*i*). (2.) The practical rule to be derived from these cases plainly is, to avoid the recurrence of similar questions, by words which clearly comprehend the two events of the deaths both of the wife and husband.

(*a*) AND which provisions above written in favour of the said B. she hereby accepts of in full satisfaction of all terce of lands legal share of moveables and every other thing that she *jure relictæ* or otherwise could ask claim or demand from the said A. or his heirs executors and representatives by and through his death if she shall survive him or that her nearest of kin could ask or demand from him through her death if he shall survive her.

(*b*) 1661, c. 10; Ersk. 3. 9. 16.

(*c*) M'Kinnon, 24th Feb. 1763, M. 2278, 6451.

(*d*) Tod, 12th Dec. 1770, M. 6451.

(e) Riddell, 28th Nov. 1781, M. 6457; Milne, 5th Dec. 1822, F. C. The case of Hogg and Lashley, 16th June 1795, M. 4628, related to a marriage-settlement made in England, where *jus relictæ* is not received, and which was held to regulate the whole rights of the parties, notwithstanding that they had become domiciled in Scotland. See Bell, Pr. 1946.

(f) Sinclair, 16th Feb. 1736, Elch. *Husband and Wife*, 6; Wemyss, 16th Nov. 1768, M. 9174, Hailes, 238.

(g) Ersk. 1. 6. 40, and notes * and (by Ivory) 172.

(h) Thompson, 18th Feb. 1743, M. 6142.

(i) Crawford, 24th Dec. 1746, M. 2274.

104. PROVISIONS TO CHILDREN.—Where the provision for the widow is by way of annuity, the children's provisions are necessarily separate, and form the seventh clause of the contract. A conveyance to the spouses and children in fee and liferent is exemplified above, (§ 91-2.) There are certain general rules connected with the subject which apply equally to all forms of provisions to children.

105. RULES OF CONSTRUCTION OF PROVISIONS TO CHILDREN.—1. *Terms for describing the children.*—(1.) In destinations of land property, the terms, *heirs of the marriage*, *heirs and bairns*, *heirs and children*, and the like expressions, import the heir in heritage (a); and although the rule in regard to sums of money secured, or appointed to be secured over heritage, seems at an early period not to have been distinctly ascertained (b), it is now determined that these follow the same rule with proper feudal rights (c). A moveable sum or subject, again, divides, under a destination so conceived, among all the children as heirs *in mobilibus* (d); and even where there is heritage, which passes to the eldest son as heir, he is nevertheless held to be comprehended under the terms *bairns or children*, so as to take his share of a money provision as a bairn of the family (e); more especially where the provision is in satisfaction of all the children could claim, excepting what the father should farther provide to them

of his own free will, and the heritage has been conveyed to the eldest son by the father's disposition (*f*). (2.) The terms for limiting the provision to younger children, are, *children besides the heir;* but as these exclude heirs-portioners, and would thus apply to a family of daughters so as to vacate a special provision in a question with creditors (*g*), the words, *but to the whole daughters, if there are no sons of the marriage*, may be added. (3.) A mixed provision of heritage and moveables, or of stock and conquest, has, in like manner as a moveable subject, been held to divide when given to *heirs and bairns;* but it is a *quæstio voluntatis*—a question of intention, depending on the scope of the whole clauses of the deed (*h*); and therefore the words *bairns and children* should be employed to prevent ambiguity. (4.) The terms *heirs male or female* import a right in all the children to an equal share of moveables (*i*). (5.) *Heirs whomsoever* is said to be a flexible term, which may be qualified by other terms clearly showing an intention to give the whole to one child, as the heir in heritage, for the purpose of establishing a family (*k*). But, in the absence of qualifying expressions, it seems now established, that the words are to be taken as importing a right in all the children equally (*l*). (6.) The terms, *daughters and heirs-female*, or, *daughters and heirs-female failing heirs-male*, give a moveable subject to the immediate daughters (although not in a technical sense the heirs) of the marriage (*m*). (7.) *Eldest or only daughter* is interpreted *disjunctive*, and thus imports the eldest daughter in a family, as well as an only daughter (if there be but one) of the marriage (*n*). (8.) *Bairn in the house* implies, according to Stair, something more than that the child shall receive his legal provisions as one of the family, because these can only be renounced and discharged by express words, or the acceptance of a provision as in lieu of them, and make the child an equal sharer

in the father's estate without collating the tocher and other advances made on his marriage or independent establishment, notwithstanding his separation from the family, his marriage or his carrying on a trade by himself (*o*); and the reason thus assigned appears sufficient to meet the criticism of Erskine (*p*). Even an express discharge of legitim, if qualified by a declaration that the child shall continue a bairn in the house, seems to import no more than that the child shall collate the sums received as a consideration for the discharge (*q*). (9.)] A declaration, that a child shall be *an equal sharer or portioner with the other children*, has a similar meaning and effect (*r*).

2. *Term of payment immediate or fixed.*—This form is inconsistent with the nature of an antenuptial contract, although a bond of provision or a provision in a postnuptial contract may be declared to be payable immediately, or at a fixed term, or on the occurrence of an event which must arrive, such as the death of a specified individual, and thus made absolute (*s*). But it is unusual to make children's provisions payable during the lifetime of the father.

3. *Provision conditional, or term of payment uncertain.*—Conditional provisions are subject to the same general rules with conditional legacies; (above, § 54. 3.) (1.) A provision may be restricted, or entirely excluded, on the existence of a certain event. Thus, a sum or subject provided to daughters, *failing heirs-male of the marriage*, is not due if an heir-male survive the father for the shortest period (*t*); or, if the condition be the succession of a particular heir or substitute in a destination, the exclusion of such substitute, by reason of the forfeiture of the estate, has been held to evacuate the provision (*u*.) (2.) An uncertain term of payment is regarded as a condition, *(dies incertus pro conditione habetur)*; and thus a provision payable at majority or marriage, or any other contingent term, as de-

pending on the occurrence of one of the specified events, necessarily falls or lapses by the predecease of the child, whether he die before or after the father, and that although interest is declared to be payable from the period of the father's death (*v*). In questions of this nature depending on construction, provisions in marriage-contracts, settlements and bonds of provision follow the like rules as regards the granter and his heirs. (3.) The father's death is a condition that affects all provisions not declared payable at a fixed term, which are presumed to be given solely in the event of survivance (*w*); but when an express condition is mentioned, there is no room for the presumption; *e. g.* a sum payable to daughters, failing heirs-male of the marriage, appears to be due, unless it is otherwise stipulated, on the predecease of the wife without male issue (*x*). *Mortis causa* provisions consequently lapse by predecease; and it has been held that an express substitution of heirs does not bring in the heirs whomsoever of the predeceasing child (*y*), a determination, opposed, however, to the rule in legacies, (above, § 50. 2, 64. 7.) and apparently inconsistent with the result of a later case, which, although relating to heritage, seems to have proceeded on the presumption of intention (*z*).

(*a*) See Bell, Pr. 1961, *et seq.*; Duff, Feud. Convey. § 295, 312.

(*b*) See Scot, Feb. 1684, M. 12,842; Allardice, 12th Feb. 1721, Robertson's Ap. 399.

(*c*) Campbell, 15th June 1770, M. 13,020; Bowie, 23d Feb. 1809, F. C.

(*d*) Ersk. 3. 8. 48.

(*e*) Brown, 21st July 1680, M. 2375, 12,842.

(*f*) Pringle, 21st Jan. 1741, as reversed on ap., Cr. and St. 1. 297.

(*g*) Boyd, 6th Jan. 1670, M. 12,854.

(*h*) Rankin, 25th June 1736, M. 14,931, Elch. *Mutual Contract*, 4; Wilsons, 1st Dec. 1769, M. 12,845, Hailes, 313.

(*i*) Robertson, 23d July 1766, Hailes, 87.

(*k*) Ersk. 3. 8. 48, *in fine*.

(*l*) Dallas, 1st Feb. 1743, B. S. 5. 728, as qualified by Home, 28th Jan.

1757, B. S. 5. 330. In the later case of Watson, 13th June 1760, M. 985, the term *heirs whomsoever* was explained by the word *bairns* occurring in another clause of the deed. See above, 64. 7.

(*m*) Watson, (or Cred. of Redhouse,) 23d Nov. 1743, M. 2306, B. S. 5. 222, Elch. *Provisions to Heirs*, 3; Ewing, 1st July 1747, M. 2308.

(*n*) Mathieson, 20th Nov. 1766, M. 11,453; Hailes, 155.

(*o*) Stair, 3. 8. 45, 46; Beg, 18th Nov. 1737, M. 2379.

(*p*) See Ersk. 3. 9. 25.

(*q*) Spence, 19th July 1766, M. 8178.—The provision was declared to be "in full of all she could claim as legitim bairns' part of gear or otherwise whatsoever provided nevertheless that she shall be a bairn in my house and have a part of my goods and gear the time of my decease my other daughters being first as well provided."

(*r*) Stair, as in (*o*); Ersk. as in (*p*). See Macmillan, 18th Feb. 1631, M. 12,849.

(*s*) See Ainslie, 28th June 1749, M. 9363, 13,044; Campbell, 7th Dec. 1707, M. 6342; Home, 28th Jan. 1807, Bar. Hume, 530.

(*t*) Drummond, 7th July 1738, M. 12,970; Elch. *Condition*, 2. See Somervilles, 19th June 1761, M. 2959.

(*u*) Oliphant, 23d July 1752, M. 2275.

(*v*) Stair, 1. 5. 6; Edgar, 17th Jan. 1665, M. 6325; Clerk, Feb. 1682, M. 6330; Bells, 1st Feb. 1749, M. 6332; Omey, 19th Nov. 1788, M. 6340, 12,973; Home, 28th Jan. 1807, Bar. Hume, 530. The authority of the case of Burnetts, 9th Dec. 1783, M. 8105, in regard to a legacy, was held to have been superseded. See above, § 54. 3. Grindlay, 1st July 1814, F. C.; Arbuthnot, 7th June 1816, Bar. Hume, 536.

(*w*) Ersk. 3. 9. 9; Gordon, 17th Nov. 1757, M. 6343; Russel, 10th March 1769, M. 6372, 13,049; Hailes, 288. See Bell, 14th Jan. 1730, M. 6342.

(*x*) Ewart, 8th Feb. 1706, B. S. 5. 29.

(*y*) Russel, as in (*w*). See note (by Ivory) 583, Ersk. 878.

(*z*) Sutties, 19th Jan. 1809, F. C.

106. CONDITIONAL INSTITUTION AND SUBSTITUTION.—The rules applicable to legacies are generally in force with reference to provisions; (above, § 51, *et seq.*) The following particulars are worthy of notice: (1.) In marriage-contracts and bonds of provisions it is unusual to substitute third parties to the children, even the relations of the mother; yet this is occasionally done. (2.) A destination of a sum or subject to the wife, *in case of no child of the*

*marriage surviving the husband, or in the event of all the children dying before majority or marriage*, is not a conditional institution of the wife, but a contingent debt, which is capable of being assigned by her before vesting, and is due to her assignee after her own death on the condition being purified (*a*). (3.) A substitution to others failing the children, or to one child failing another, is defeasible by the institute, like an ordinary substitution in legacies, as is likewise a clause of return of an onerous provision (*b*). (4.) An implied institution of grandchildren or direct issue maintains in provisions to children, whether by contract, bond of provision, or *mortis causa* settlement; (above, § 51. 5.)

(*a*) Ersk. 3. 9. 9; Burden, 27th April 1738, Elch. *Mutual Contract*, 7, reversed on ap., Cr. and St. 214. See the distinction here between a contingent debt and a conditional legacy.

(*b*) Ersk. 3. 8. 41; Edgar, 6th July 1736, M. 4325; Deans, 16th July 1745, M. 12,970; Wauchop, 22d Dec. 1752, M. 4404; Mackay, 13th Jan. 1835, S. 13. 246, and opinion of Lord Medwyn.

107. VESTING OF PROVISIONS.—(1.) A provision payable at a fixed period, or a term which must arrive without reference to a period in the life of the child, vests at his birth, or if granted to one *nominatim*, immediately on the deed being perfected (*a*); a *mortis causa* provision vests at the father's death; and a conditional provision, like a conditional legacy, on the occurrence of the event on which it depends (*b*); (above, § 54. 3.) The first is an absolute debt transmissible to heirs or disponees; the last, if payable at a term which may arrive during the father's lifetime, although still a mere conditional provision that lapses by predecease, gives a *jus crediti* in bankruptcy; (below, § 108); whereas the second is only a right of succession, which, in the same manner as the last, is transmissible to heirs of the body, but confers no *jus crediti*,

(2.) The following particulars are worthy of notice with reference to provisions in contracts and bonds of provision. Although service or confirmation be unnecessary where the provision (as in a postnuptial contract or bond of provision) is to children *nominatim*, or resolves into *jus crediti*, a distinction has been drawn between a *jus crediti* and a mere *spes successionis* (*c*). But the only decided case which has been found related to a sum heritably secured and destined to the heirs whatsoever of the marriage (*d*). In a later instance, it was assumed that the necessity of service even by the heir of a marriage is limited to proper feudal rights (*e*). Where, again, the provision is to *heirs and children nascituri*, the argument in favour of service appears in no instance to have prevailed in reference to a moveable sum or subject (*f*). It is plainly inapplicable to the character of the right, and, as a declaratory proceeding, it seems inconsistent with the claim of the whole members of a family. It may therefore, perhaps, be concluded, that under a destination to the children of a marriage service is unnecessary to vest a moveable sum or subject. (3.) The presumption is in favour of the vesting. Thus, the share of a provision, payable at the majority or marriage of children, whichever event should first happen, under a declaration that if any died before majority *or* marriage, the one-half of the shares of those predeceasing should accresce to the survivors, was held to vest in one who died after attaining majority, although unmarried, and the condition in favour of the survivors to be evacuated (*g*). Thus, also, a provision, payable on the death of the parents, vests on the predecease of the father, although the payment is suspended until the mother's death (*h*); and if payable, one moiety at majority or marriage, and the other at the father's death, it vests wholly on the father's death, if first occurring (*i*). (4.) Payment prior to the abolute vesting of a provision bequeathed by *mortis causa* settlement has

been authorised, in circumstances highly favourable to the claim of the children, on caution being found for the protection of the interests of the prospective claimants; (above, § 57.) (5.) The effect of a trust in the vesting of legacies and provisions in settlements is adverted to above, (§ 53.)

(a) Campbell, 7th Dec. 1707, M. 6342; Home, 28th Jan. 1807, Bar. Hume, 530.

(b) Carstairs, 21st June 1672, M. 13,049.

(c) Ersk. 3. 8. 73.

(d) Anderson, 16th Nov. 1747, M. 12,868. See Bell, Pr. 1989.

(e) Moncreiff, 1st March 1765, B. S. 5. 909.

(f) See Campbell, 3d Feb. 1732, M. 12,885; Christie, 21st Jan. 1806, M. *Provisions to Heirs, &c.* No. 5; Cameron, 18th Nov. 1784, M. 12,879.

(g) Bothwells, Dec. 1747, M. 2989, Elch. *Provisions to Heirs, &c.* 11.

(h) Macdonell, 20th June 1758, M. 12,970.

(i) Mackays, 1790, Bell, 394.

108. JUS CREDITI AND ONEROSITY (a).—1. *Distinction between jus crediti and spes successionis.*—The results of the rules on these heads seem to be as follows: (1.) A power to enforce a stipulation of whatever kind during the lifetime of the father, gives a right of credit; whereas the postponement of the term of implement or payment until after the father's death confers a mere expectancy. (2.) But, in a practical sense, the effect of *jus crediti* is often not stronger than that of *spes successionis.* Thus, although an obligation by the father to pay a sum of money to the children on their majority or marriage does not differ in name from an obligation to invest a sum for behoof of the children, both importing a right of credit, there is this essential difference, that the former gives a title to demand implement by payment, and the latter implement only by investment; so that it depends on the term of payment of the invested sum,

(unless the security be in the name of a trustee,) whether this latter sort of *jus crediti* shall produce any useful effect in a question with creditors.

2. *Modes of constitution.*—(1.) As against the father's representatives or a cautioner, provisions to children constituted in proper terms are absolutely effectual, without respect of the period of payment whether prior or subsequent to the father's death; and that although his obligation should have been nominally implemented by investing the sum or subject, unless such investment absolutely secured it for the children (*b*). (2.) But in questions with creditors the course of the authorities has been against the right of the children being considered as forming a nexus on the property of the father, so as to control his powers of disposal, or in any degree limiting the fee in his person in questions with his creditors. Accordingly, the children have, in the common case, been thought to enjoy a mere *spes* or hope of succession during the lifetime of the father. And although the leaning appears now to be the other way, and may ultimately turn the presumption in favour of the children, in questions whether they have acquired a *jus crediti* or only a *spes successionis*, there has hitherto occurred no relaxation of the rule which can be relied on in practice (*c*). (3.) To give the children an undoubted right to claim in competition with the father's creditors, the provision must be made payable at, or to bear interest from a period which may arrive during the father's lifetime, or vested in the parents or either of them, or in a third party, in trust for behoof of the children, or a declaration introduced that the father shall do no deed contrary to the provision. The same effect will be produced by providing a sum to the parents, or one of them, in liferent allenarly, (or otherwise, so as to produce a fiduciary fee,) and to the children *nascituri* in fee; or to the parents

in liferent simply and to a child or children *nominatim* in fee, as may be done in a postnuptial contract or a bond of provision. (4.) It is, however, to be observed, with reference to money provisions, that it is only by means of a particular investment for behoof of children *nascituri*, through the intervention of a trust, that these can be made absolutely preferable in questions with the creditors of the father or other relation granting the provision; for although an obligation, duly constituted and prestable during the father's lifetime, is effectual to give a right to claim on his estate, such claim can only be ranked according to its due order of preference as fixed by the nature of the security.

3. *Provisions in contracts and other deeds contrasted.*—Certain distinctions maintain in questions with creditors among provisions by antenuptial contract, by postnuptial contract, by bond, and by settlement. (1.) Provisions, whether to the wife or children in antenuptial contracts, are onerous and obligatory from the date of the marriage, and effectual according to the machinery employed in their constitution. (2.) Those, again, granted to wives in postnuptial contracts, although valid in questions with the granter and his representatives in so far as not revocable and revoked as donations, are subject to restriction in competition with creditors whether prior or postponed. Such, as well as provisions to children contained in bonds and postnuptial contracts, are noticed below. (See *Postnuptial Contracts and Provisions.*) (3.) Provisions in settlements, being gratuitous and *mortis causa*, are truly legacies, and affect only the free estate of the granter, although they may become onerous by being repeated in a future contract of marriage of the child to whom they are given (*d*). (4.) But provisions in bonds or postnuptial contracts, or made by a parent (or relation) in the contract of a child, may, from the nature of the

agreement, and the consideration in lieu of which they are granted, *e. g.* the renunciation by a child of legal provisions, become onerous in competition with creditors, although payment should be postponed until after the death of the granter (*e*).

(*a*) See Bell, Pr. 1986-7, and auth. cited; Duff, Feud. Convey. § 312.

(*b*) M'Intosh, 27th Dec. 1716, M. 12,881; Fotheringham, 5th Dec. 1734, M. 12,929, 12,941.

(*c*) See Herries, Farquhar and Co., 9th March 1838, F. C., D. 16. 948, opinions of consulted Judges, and auth. cited.

(*d*) See Garden, 26th Nov. 1822, F. C.

(*e*) Gordon, 9th Feb. 1833, F. C., S. 11. 368: see note of Lord Moncreiff, and auth. cited.

109. CONTROL OF THE FATHER (*a*).—1. *How excluded.*—To remove, or confer a power to remove, a sum or subject provided to children from the father's control, the fee must be vested in a trustee, or a *jus crediti* constituted for their behoof, or, as in the case of a bond or postnuptial contract, an investment made in the names of the children, or a *jus crediti* conferred on them. So long as the father retains the fee, and the children have no power of enforcing implement of the obligation, but a mere *spes successionis*, the law gives him a large measure of control over the subject.

2. *Power of disposal.*—This is absolute if the sum or subject given away be disposed of *de præsenti*, and not by a *mortis causa* or other gratuitous deed. Thus, a provision of conquest to the wife or children is of the *universitas* of the conquest, and cannot affect particulars.

3. *Power to provide wife and children of a future marriage.*—When the children of the first marriage have only a *spes successionis*, or having a *jus crediti*, are not invested in the exclusive right by means of a trust or other competent form of security, this power belongs to the father to the extent of a rational provision.

4. *Power of division.*—(1.) Whether the provision be of a particular sum, the conquest during the marriage, or the *universitas* of the estate, the father's power of division seems to be undoubted at common law (*b*). Nevertheless, it is usual to introduce an express reservation of this power. (2.) A power of division must be reasonably exercised, it being *ultra vires* to cut off any member of the family with a shilling, or other merely elusory share, which would be tantamount to entire exclusion (*c*). (3.) It may be conferred on a third party even in a bond of provision having reference to the contract (*d*). (4.) But when not exercised by the father or the person to whom it has been committed, by a probative writing, the Court have declined to make a division, and held the principle of equality to operate (*e*).

(*a*) See on the subject of this section, Ersk. 3. 8. 38, *et seq.*; Bell, Pr. 1974, *et seq.* 1988.

(*b*) Ersk. 3. 8. 49; Edmonstoun, 19th July 1708, M. 3193; Campbell, 21st Dec. 1739, Elch. *Mutual Contract*, 14, *Arbitrium boni viri*, 2, and *Jurisdiction*, 20; B. S. 5. 214, 651, 683; M. 674, 3195, 4076, 6849, 13,004; Home, 28th Jan. 1757, B. S. 5. 330.

(*c*) Ersk.; Campbell, as in (*b*); Wight, 9th July 1818, Bar. Hume, 539; Marjoribanks, 17th Feb. 1837, F. C., D. 15. 486.

(*d*) Campbell, as in (*b*).

(*e*) Campbell, as in (*b*); Marjoribanks, as in (*c*); Sievright, 27th Jan. 1824, S. 2. 643. See Edmonstoun, as in (*b*), where a bond of provision by the father was held to be a valid mode of exercising his implied faculty to divide a provision in a marriage-contract.

110. RIGHTS OF THE CHILDREN.—(1.) The children have a perfect right of fee, a *jus crediti*, or a mere *spes successionis*, dependent on the terms in which the provision has been conferred; (above, § 105-8.) The first is available according to the nature of the investment; the second is a valid title in competition with creditors; but the last, only as against the representatives of the father, and his free estate. (2.) An absolute right or claim of debt is from its nature as-

signable, whereas the conveyance of a mere expectancy is contingent on the vesting of the provision by the survivance of the child. Hence a provision of this nature to a daughter is not carried to her husband by their contract of marriage, unless she survive her father (*a*). (3.) The children can transact with and discharge their father, even as regards their contingent claims under a mere *spes successionis;* and thus the provision of a daughter who contracts marriage, or a son who enters a profession, may be safely advanced by the father, without being considered a donation, and thus prejudicing the rights of other children (*b*).

(*a*) Maconochie, 12th Jan. 1780, M. 13,040.
(*b*) See Bell, Pr. 1970; Duff, Feud. Convey. § 299, 312.

111. FORMS OF PROVISIONS TO CHILDREN.—In framing clauses of provision in contracts of marriage or bonds of provision, regard will be had to the rules of interpretation above explained; (§ 105-8.)

1. *Liferent and fee.*—A provision of a sum of money to the spouses in liferent, and the children in fee, is exemplified above, § 91-2. In order to restrict the right of the father to a fiduciary fee, certain technical terms are essential, as a liferent in expression often confers on one of the parents a fee in substance. (See above, § 92.)

2. *Provision by burdening the wife.*—The effect of this form is explained above, § 98. 3.

3. *Direct provision of a sum of money.*—To confer a *jus crediti*, the provision will be made payable to the children, on their respectively attaining majority or being married, or other period which may arrive during the father's lifetime, a power of division being usually reserved to the father; (above, § 108-9.) As is remarked, however, in the Juridical Styles, there is this disadvantage attending a provision prestable during the father's lifetime, that whilst it is intended to give a title in competition with creditors,

the right may itself be cut down by the statutory sequestration and discharge of the father (*a*), a risk which does not attend a provision payable on his death, which is exposed, however, to the contingency of the father's estate becoming insolvent. But it is thought that the advantages and disadvantages of these two forms of provision are thus by no means counterbalanced; for it is well known that many more persons settle their affairs by private arrangement than by means of a sequestration, and that insolvency is in numerous instances concealed until after death.

4. *Provision by burdening the heir* (*b*).

5. *Obligation to invest a sum of money;* (above, § 91.)—This form of provision confers a merely nominal *jus crediti*, unless the sum when invested is to be payable, or to bear interest during the father's lifetime, or to be held by trustees for their behoof. The latter is the only really effectual form, because implement of an obligation to invest does not necessarily secure the sum for the children; which, unless the father's right of fee be excluded and the fund separated from his estate, may still be attached by his creditors. And, although implement of this sort does not exhaust a valid obligation, in a question with the heir in heritage or a cautioner (*c*), such recourse is not always available to younger children. But the form of a trust is unusual, unless among persons to whom it is no inconvenience to have a considerable sum set apart for a distant object.

6. *Provision by life insurance;* (above, § 98. 1.)—The advantages attending life insurance enable the parties to adopt a very eligible form of provision, as it leaves the father in possession of those funds which may be necessary for the purposes of business. The mode is to grant a conveyance of the policy to trustees for behoof of the children, containing an obligation to make good the annual

premium of insurance; and for this purpose the insurance will be effected prior to the execution of the contract; or the trustees may be authorised to effect the insurance in their own names as such.

7. *Universitas and conquest.*—(1.) A provision in favour of children of the whole moveable estate seems necessarily to supersede the legal claim of legitim; (below, § 113); and also to deprive the father of the dead's part, out of which alone has he the power of conferring donations by way of legacy on others. This form of provision is therefore inconvenient and unusual; for although it cannot tie up the hands of the father from disposing of his means during his lifetime, it excludes all *mortis causa* or other gratuitous deeds in favour of others than the children, as to whom a power of division is implied. (2.) Conquest is, for a similar reason, an inconvenient form of provision, besides that it is of vague import (*d*). From the difficulty of determining what truly forms a deduction from the conquest, it approaches very nearly in effect to a provision of the *universitas.*

8. *Obligation by a relation or cautioner.*—A cautionary obligation undertaken even by a stranger, which is duly expressed, is a valid mode of securing provisions in a contract of marriage, in a question with children; for although a cautioner for the father to a third party would have relief against them as the father's heirs of provision, the plea of *frustra petis quod mox est restiturum,* has been repelled when preferred by a cautioner in a marriage-contract, because the children claim from the cautioner, not as heirs but as creditors. The cautioner, it is true, had a claim of relief against the father, which he might have enforced in his lifetime by obtaining the investment in proper securities in favour of the children of the provisions for which he had become bound; but he is merely the debtor of the children, and is presumed, like

any other debtor, to have received an equivalent for his obligation (*e*).

(*a*) Jurid. Styles, 2. 222.

(*b*) See Duff, Feud. Conv. § 312.

(*c*) M'Intosh, 27th Dec. 1716, M. 12,881; Fotheringham, as in (*e*).

(*d*) See Bell, Pr. 1974, *et seq.*; Duff, Feud. Conv. § 307.

(*e*) Fotheringham, 5th Dec. 1734, M. 12,929, 12,941; Ross, 6th Dec. 1754, M. 12,941, *note*. See Bannerman, 20th July 1738, Elch. *Mutual Contract*, 8.

112. DISCHARGE AND SATISFACTION OF PROVISIONS.—1. *Discharge.*—In construing the terms of deeds or clauses discharging prospectively provisions in contracts of marriage or bonds of provision, the result depends on a fair interpretation of the words; and it is not a sufficient ground for setting aside a discharge, that the sum accepted in lieu of prospective claims is inadequate, when compared with the amount of the father's estate at a future period, if the words used truly embrace such claims (*a*). But where the terms plainly refer to legal and not provisional succession, the discharge will be applied solely to the former (*b*).

2. *Satisfaction.*—(1.) The rule, as laid down by Stair, leaves the presumption in favour of donation, excepting in the single instance of tocher advanced with a child at marriage (*c*). And, accordingly, additional provisions, especially if *mortis causa*, as well as alimentary advances, although made to a child who has a profession, are not in the ordinary case imputed in satisfaction *pro tanto* of prior provisions (*d*). (2.) The practical inference from these premises plainly is to introduce an express declaration in *mortis causa* deeds, that the provisions therein made shall be accepted in place of those which are due by prior contract or bond, when such is the intention of the granter, in order that the child may have the option of keeping the latter or accepting the former. (3.) Circumstances have occurred in which a claim for the two pro-

visions was held to be excluded, on the ground of presumed intention. The case was that of a daughter born a bastard, in which character a special *mortis causa* provision was made to her by her father; but having afterwards been legitimated by the marriage of her parents, she came within the scope of a prior bond of provision granted in favour of *younger children*, which was held to evacuate the special provision (*e*).

(*a*) Ewen, 15th Jan. 1824, S. 2. 612, as reversed, W. S. 1. 595.—(*Clause.*)—" Which sum is accepted in full contentation of all goods, gear, " debts, sums of money and other moveables whatsoever, which she might " anyways ask, claim or crave by or through the decease of the said J. M., " her mother, by virtue of her contract of marriage, or of any clause, article " or consideration therein contained, which is hereby discharged to all in- " tents and purposes, as fully and effectually as if the same was particularly " engrossed, or by any other manner of way, or by or through the decease " of the said J. E. her father, whenever the same shall happen, either as " bairns' part of gear, dead's part, portion-natural, or on any other cause or " account whatsoever, good-will only excepted."

(*b*) Gordon, 9th June 1835, S. 13. 882, affd. on ap. (*Clause.*)—" That " the said L.2000 of tocher now paid by the said W. G. with his said daughter " shall be in full of all the said M. G. can claim in right of her said father, " or of the said A. G. her mother, in any manner of way, and in full of every " claim competent to her of bairns' part of gear, legitim, portion-natural, " executry and every thing else that she could ask or claim by and through " the decease of her said father and mother, excepting what the said W. G. " may think fit to grant or bestow of his own free will allenarly." A claim competent under a bond of provision was held not to be discharged.

(*c*) Stair, 1. 8. 2.

(*d*) Stair, as in (*c*); Dundas, 12th June 1827, S. 5. 790; Erskine, 24th May 1827, S. 5. 696. See above, as to legacies, § 64. 3.

(*e*) Nasmyth's Trustees, 19th Dec. 1833, F. C., S. 12. 243. There was, however, a deficiency of funds, so that the *mortis causa* donation could in no view be supported.

113. CLAUSE DECLARING THE PROVISIONS TO BE IN PLACE OF LEGITIM, &c. (*a*).—1. *Legitim.*—(1.) Legitim is the right which children have in a share of the deceased father's free estate, and is a half, or only a third, if the wife survive

and have not renounced her *jus relictæ*, which exhausts another third; the remaining half or third being dead's part, or that share of the goods in communion which is subject to the gratuitous disposal of the husband by *mortis causa* deed. Legitim is a right of a mixed nature, combining the properties of *jus crediti* and *spes successionis*. The former belong to it in as far as the children acquire on their birth a right to legitim contingent on their survivance, which the father cannot disappoint by gratuitous *mortis causa* deed, or in any manner qualify or burden even by a substitution of another failing the child after having survived the father,—a rule which maintains even when the effect of the qualification would be for the benefit of the child, as by the exclusion in a settlement of the *jus mariti* of a daughter's husband. It vests likewise without confirmation. On the other hand, it is a mere hope of succession, as depending on the child's survivance, and subject, during the father's life, to be defeated by his acts and deeds whether onerous or merely gratuitous (*b*). (2.) Although the right to legitim cannot be defeated after the existence of the children by any gratuitous *mortis causa* deed of the father; yet as the father's power over his estate is absolute before marriage, it may be excluded by an express declaration in an antenuptial contract of marriage which confers provisions on the children, that these are made in satisfaction of the legitim, and that without reference to the amount of the provision if not elusory (*c*). (3.) But the provision, however large, unless of the whole estate and conquest, (for the *universitas* of necessity embraces a part,) is not held to exclude the legitim without express words, because there is plainly no limit to the power of accumulation (*d*); and the practice is thus to express it when the children are provided. (4.) The terms, *portion-natural*, and *bairns' part of gear*, are synonymous with legitim, and these or some of them must be expressed. A general

clause, for example, of all that the child can ask or crave by and through the father's death, would probably be held to relate to the dead's part, as falling to the child by right of succession (*e*). (5.) Legitim may be excluded by an express renunciation in a postnuptial contract or the marriage-contract of a child, or by the acceptance of a provision as in lieu of the legitim, whereby he becomes forisfamiliated, or ceases to be a child in the family. But the discharge of the legitim is not presumed from the child's marriage, establishment in a trade apart from his father, or receiving a special provision from the father on his marriage, unless it be accepted as in full of the legitim (*f*).

2. *Dead's part.*—(1.) The prospective right of succession in the children to a share of the father's free moveable estate, or *dead's part*, (when not disposed of by will,) may, without any question, be cut off by an antenuptial declaration, as the father has at all times, whilst in *liege poustie*, the disposal of the dead's part (*g*). (2.) It cannot be excluded by implication; but, in a postnuptial contract to which the child is a party or the marriage-contract of a child, it may be renounced by the use of terms which embrace not only legitim, but the right of succession, (the proper word being *executry*,) or by express acceptance of a provision as in lieu of it. It is not comprehended by the terms, or *others whatsoever that the child can ask, claim or crave, by and through the father's death*, or equivalent words merely supplemental of the discharge of legitim, which is here held to define the species of right intended to be discharged (*h*). But such words, employed in a general sense, would seem (as above suggested) to import the dead's part or executry, without including legitim. (3.) Hence the practical rule may be deduced to use the proper terms, *legitim* and *executry*, for describing the bairns' part and dead's part, or either of them that it

is the intention to exclude or discharge. (4.) Forisfamiliation does not discharge the dead's part.

(*a*) AND WHICH PROVISIONS before written in favour of the child or children of the said marriage shall be full satisfaction to them of all bairns' part of gear legitim portion-natural executry and every thing else that they could claim or demand by or through the decease of the said A. their father.

(*b*) Stair, 3. 8. 45; Ersk. 3. 9. 16, 22, *et seq.* and note (by Ivory) 594; Bell, Pr. 1585, 1587, and auth. cited; Robertson, 2d June 1742, M. 8202, Elch. *Legitim*, 6. See Mackintosh, 7th Dec. 1838, F. C., D. B. M. 1. Here is a remarkable example of the indirect exclusion of the *jus mariti* of a daughter's husband in regard to the legitim, by means of a settlement on her and her children by the father of a share of the *universitas* of his estate, more valuable than the legitim, under the exclusion of the *jus mariti*. In a question with the husband's creditors claiming the legitim as in his right, the wife was held entitled to exercise her option, so as to take the share of the succession under the settlement, to the exclusion of the *jus mariti*.

(*c*) Ersk. as in (*b*). According to Bell, (Pr. 1587,) it must be reasonable in amount.

(*d*) Stirling, 17th June 1732, Elch. *Legitim*, 1. See Burden, 29th June 1738, Elch. *Legitim*, 7, as reversed, Cr. and St. 214; Home, 28th Jan. 1757, B. S. 5. 330; Stephen, 18th Nov. 1803, Bar. Hume, 286. See also Ersk. 3. 9. 23, and note (by Ivory) 604; Bell, Pr. 1587. In Burden, the provision was not in words of the *universitas*, but of a special sum and the conquest, although, from their amount, the effect may have been to provide the entire estate; and the House of Lords, on appeal, held that legitim was not excluded merely because the subjects specially provided turned out to be the more advantageous provision. In the case of Home, the report bears that Lord Kilkerran observed, "as the whole "estate and conquest was provided by the contract of marriage, there "is no place for the legitim, and all did agree in this."

(*e*) Bell's Pr. 1587.

(*f*) Ersk. 3. 9. 23; Bell, Pr. 1587, and auth. cited; Maitland, &c. 20th Jan. 1836, D. 14. 309, affd. S. and M'L. 2. 377. See Hogg, 7th June 1791, M. 8193; Clark, 27th Jan. 1835, F. C., S.

(*g*) See Ersk. as in (*f*); Bell, Pr. 1592.

(*h*) Ersk. as in (*f*); Bell, as in (*g*); Hepburn, 24th June 1785, M. 5056; Anderson, 22d Nov. 1743, M. 5054, Elch. *Executor*, 12; Pringle, 30th June 1741, Elch. *Legitim*, 5.

114. CONVEYANCE BY THE WIFE (*a*).—1. *Arrangements*

*depend on circumstances.*—The mode of disposing of the tocher or property brought by the wife depends on arrangements suitable to the circumstances of the parties. The whole may, as in the common case, be conveyed to the husband in consideration of the provisions settled on the wife; or it may be secured to the wife and children by means of a trust-conveyance contained in the deed, or in a separate form; or the *jus mariti* may be excluded. If the husband, again, belong to a profession or trade, it may be arranged that he shall have the command of the whole or a portion of the wife's fortune, as may be agreed on, and the ultimate return of the sum thus placed at his disposal may be secured by life insurance.

2. *Trust-conveyance by wife or her relations.*—(1.) This is the safest mode of securing the wife's fortune, and it seems to be the only competent form for preserving moveable *acquirenda* from the influence of the husband; for, as the *jus mariti* cannot be excluded except in relation to particular subjects which are the actual property of one of the parties (*b*), (a rule for which it is not easy to assign a valid reason,) it must necessarily attach to all funds not the property of the wife at the time of the marriage; although it seems unquestionable that the right to hold *acquirenda* under the directions of a trust may validly be conferred on trustees as the assignees of the wife (*c*). (2.) When the property is considerable and variously invested, it may be convenient to constitute the trust by a separate deed, in order to avoid exposing the family arrangements expressed in the contract (*d*); and if the separate deed have special reference to the contract, bear the consent of the intended husband, and a declaration that it shall be irrevocable during the marriage, there seems no reason to doubt that the principle of the case of Anderson (below) will apply so as to remove the subjects from the control of the parties even by joint deed, which the wife might be induced

by the *reverentia maritalis* to concur in to the prejudice of herself and her children. (3.) After the proclamation of the banns, the husband must join in the separate deed, as a consenter (*e*). (4.) Power may be reserved to the wife to uplift the whole or any part of her fortune, to be invested in land under such restrictions as shall be necessary for excluding the husband's rights, or for any other desirable purpose, such as the husband's promotion in the army or other profession, where the advance of occasional sums of considerable amount may be required. Reserved powers of this description are, however, liable to abuse from the influence of the husband, and ought to be guarded by providing for the concurrence of the trustees in every application of the funds. (5.) An antenuptial trust-conveyance by the wife may, by appropriate words of style, be rendered absolute, and irrevocable even by the joint deed of the spouses (*f*). (6.) Property may be vested in the wife after the marriage, by the father or other relation, or even a stranger, in trust, for behoof of herself and the children of the marriage, and so as to exclude the *jus mariti* and curatorial power of the husband in relation to the interest and profits, in the event of his bankruptcy (*g*).

3. *Exclusion of jus mariti and right of administration.*—(1.) *Jus mariti*, in the sense here used, is the conjugal power which the husband acquires by marriage over the moveables of the wife, and the rents and produce of the heritage, including the interest of personal bonds, (which, as regards the husband, are accounted heritable,) (above, § 6,) to the effect of their becoming part of the goods in communion, and subject to the control which the husband by law has over these goods. But it appears to be merely a right of administration of the common property for the joint interest of the *socii* during the marriage; and although, as being "sole and unaccountable," (in the

words of Stair,) this right of administration may rather seem to be a "power of property, having indeed all the "effects of property during the conjugal society, yet it is "no more than is above exprest" (*h*). It is true that the leaning of our practice and decisions has been towards the absolute nature of the right, as one of property (*i*); yet it seems never to have been understood to operate indirectly; and thus, although payment (*e. g.* of a legacy) is not essential, the right must have clearly vested in the wife (*k*). Thus also the husband, although interested in the produce of heritable property, is denied the privilege of vindicating a right competent to her, such as declaring an irritancy, or reducing a deed executed to her prejudice on deathbed, without the wife's consent (*l*). And in a recent case it was, after full consideration, held by a majority of the whole Court, that where the wife had an option under a settlement by her father of the *universitas* of his estate, of taking in lieu of legitim a share of the succession, of greater value, and destined to herself in liferent and the children in fee, she could effectually exercise that option even in a question with the creditors of her husband, (whose *jus mariti* was excluded by the terms of the provision,) claiming the legitim as falling to their debtor in right of the wife (*m*). (2.) The *jus mariti* and curatorial power, or right of administration, may be excluded as regards property given to the wife, her own separate funds and estate, or a special provision conferred on her by the husband in an antenuptial contract; but not to the extent of an entire renunciation of the husband's control, as head of the family (*n*). (3.) The exclusion of the *jus mariti*, as a mode of protecting the wife's separate property, is less secure than by a trust, as there seems no obstacle to her placing it at the husband's disposal; and it causes the inconvenience of two independent funds in one family. The exclusion is by reservation, if the property

belong to the wife or come from a relation; and by express renunciation, where it is the husband's, and conveyed to her in liferent and the children in fee, as above (*o*), (§ 91-2.); but it is necessary to observe, that the reservation or renunciation must be special, both in terms, and as applicable to a particular fund or subject — not *per aversionem* of the whole property belonging or assigned to the wife, or which may be acquired by her during the marriage (*p*). (4.) The clause ought to embrace both the *jus mariti* and the husband's curatorial power, as otherwise his consent would seem to be necessary to the wife's deeds, although relating to her separate property (*q*). (5.) The *jus mariti* and curatorial power may be excluded by a third party conveying property to the wife (*r*); and they may be renounced by the husband in a deed of separation, as respects the provision settled on the wife. Without such renunciation the husband's power continues, notwithstanding the separation of the spouses, whether legal or voluntary (*s*). (6.) The exclusion may be made applicable to capital or interest, or to both (*t*). In all cases it may be advisable to exclude assignees during the subsistence of the marriage; for it is manifest that a conveyance by the wife to a third party is inconsistent with the object of an independent right in her, which is intended for the benefit of the family, in the event of the bankruptcy of the husband, or at least for her own maintenance (*u*). (7.) The husband's power to assign for behoof of creditors in a *cessio bonorum*, has been held to be excluded by a clause in an antenuptial contract, declaring the interest of funds belonging to the wife and conveyed to the husband, *to be alimentary, and not attachable or arrestable, or affectable in any manner for the husband's debts or deeds* (*v*). (8.) Household goods not strictly paraphernal, may acquire that character, and be thus removed from the power of the husband and his creditors, by means

of an inventory subscribed as relative to the contract (*w*). (9.) After marriage, it is questionable if the *jus mariti* or curatorial power can be effectually excluded whilst the parties cohabit. It would rather appear that, even as regards a reasonable provision, the renunciation is revocable as a donation, and is virtually revoked, as in questions with creditors, by the contraction of debt (*x*). (10.) The exclusion of the *jus mariti* is not necessary for the wife testing on, or disponing her separate property by deathbed deed without the consent and concurrence of the husband (*y*).

4. *Settlement of the fee.*—(1.) The object of the parties will generally be, to settle the capital of the funds belonging to the wife upon the children, divisible in equal shares, or subject to a power of division reserved to her, and burdened in whole or in part with the liferent of the husband. The children's shares are usually made payable (in the event of their surviving the parents) at majority or marriage; but it is proper, where a trust is constituted, to give power to the trustees to advance a part of the provisions destined to sons for their outfit in life. To meet the event of a child or children predeceasing the parents, there may be a conditional institution of the husband, or of the wife's relations, according to the views of the parties. It is of course assumed in such arrangements, that during the lifetime of the parents the children shall have no vested right in the provision; at least, that any liferent right reserved to the former cannot be affected without their consent. (2.) Or it may be the intention of the parties to purchase a family estate with the wife's money, for which purpose the trustees will be invested with the necessary powers. For these and other forms of provision, reference is made to the style books.

(*a*) FOR WHICH CAUSES and on the other part the said B. hereby assigns dispones and makes over to the said A. his heirs and assignees all and sundry lands and heritages goods gear debts and sums of money and gene-

rally the whole property heritable and moveable now belonging or resting owing to her or that shall pertain and be owing to her during the subsistence of the said marriage excepting only her provisions before specified with all action and execution competent to her thereanent. *(A special conveyance may be added of particular vouchers of debt,* &c.) See Jurid. Styles, 2. 24, for an example of a trust-conveyance by the wife.

(*b*) Bell, Com. 1. 638.

(*c*) Jurid. Styles, 2. 231-2.

(*d*) Jurid. Styles, 2. 225.

(*e*) Ersk. 1. 6. 22; Jurid. Styles, 2. 227.

(*f*) Bell, Com. as in (*b*); Murray's Trustees, 5th Feb. 1745, M. 5843. (*Clause.*)—The conveyance was in trust for the wife's "sole use and benefit, exclusive of the *jus mariti* of her said future husband, and of all right "of administration or other right whatsoever that may be competent to "him by and through the intended marriage, and exclusive of his debts contracted or to be contracted, wherewith the subjects thereby disponed are "declared to be noways affectable, but the same to be applied for her sole "use, and for the aliment and subsistence of her and her family, notwithstanding the coverture, with a power to the said trustees to appoint such "factors as she should name, who should be obliged to account to her, and "to pay over to her what they should receive, upon receipts to be granted "by her alone without the consent of her husband." Anderson, 2d June 1837, F. C., D. 15. 1073. *(Clause.)*—"In order to give full effect to "the foresaid stipulation and agreement, the said Thomas Gordon Torry "renounces, surrenders, upgives and overgives to and in favour of the said "Mrs Ann Vernona Simmons Gaskin Anderson, and the trustees after "named, his *jus mariti*, right of courtesy and all other right, title, power and "privileges in and to the means and estate of his said promised spouse, "both heritable and moveable, to which he might otherwise be legally entitled in virtue of the said contemplated marriage: In pursuance of which "agreement and renunciation the said Mrs A. V. S. G. Anderson being "desirous, for various weighty and sufficient reasons, to vest the said subjects in certain persons in trust, for her sole and separate use as after "mentioned, exclusive of any *jus mariti* or other right on the part of her "said intended husband, and having full confidence in the integrity and "ability of the persons after mentioned for that purpose, has given, granted "and disponed, and does hereby," &c. "give, grant, alienate and dispone to "and in favour of" *(certain persons as trustees)* "in trust always, for the sole "and separate behoof of the said Mrs A. V. S. G. Anderson, and for the "purpose of preserving to her alone and in her own person, the whole right, "title and beneficial interest in the subjects before disponed, and thereby "giving full and complete effect to the stipulations before written, and renunciation by the said T. G. Torry of the rights and privileges which

"might otherwise belong to him in consequence of the said intended mar-
"riage; for effectuating which ends and purposes, it is hereby declared that
"the said" *(trustees)* "shall be bound and obliged, as by acceptation hereof
"they expressly bind and oblige themselves, to hold just count, reckoning
"and payment to the said Mrs A. V. S. G. Anderson for their whole in-
"tromissions with the subjects before conveyed, rents, issues and annual
"profits thereof, and particularly that they shall be bound and obliged
"yearly, and each year during all the days of her life, to pay over to her
"the free proceeds" *(under certain deductions,)* "and that the simple dis-
"charge of the said Mrs A. V. S. G. Anderson by herself alone, without
"the addition or consent of the said T. G. Torry, her intended husband,
"shall be a complete and effectual exoneration to them in the premises,
"and against all mortals." A future clause declared the trust irrevocable. See opinion of Lords President, (Hope,) Gillies and Cuninghame. The trust was *in gremio* of the contract; but this seems to be by no means essential.

(*g*) Annand, 4th March 1774, M. 5844. See Bell, as in (*b*).

(*h*) Stair, 1. 4. 9.

(*i*) Ersk. 1. 6. 13, *et seq.*

(*k*) Ersk. as in (*i*), and note (by Ivory) 146; Fraser, 16th Nov. 1804, Bar. Hume, 210; Haining, 12th Nov. 1808, Bar. Hume, 214.

(*l*) Wedderburn, 29th Jan. 1789, M. 10,426; Aitken *v.* Orr, 11th Feb. 1802, M. 16,140. See Ferguson, Bar. Hume, 222; M'Cally, 15th June 1821, S. 1. 69.

(*m*) Mackintosh, 7th Dec. 1838, F. C., D. B. M. 1.

(*n*) Stair, as in (*h*); Ersk. 1. 6. 13, 14, and note (by Ivory) 147; Bell, Pr. 1561, *et seq.*

(*o*) *(Reservation.)*—DECLARING always that the said sum of L. and the whole interest to arise thereon during the subsistence of the said intended marriage *(or either as the case may be)* shall be payable to the said B. exclusive of the *jus mariti* of the said A. her husband and shall not be affectable by his debts or deeds legal or voluntary nor by the diligence of his creditors and that the receipts and discharges of the said B. alone without the consent of her said husband shall be sufficient for the said sums principal and interest or any part thereof and the receivers shall thereby be discharged of the sums so paid. *(Renunciation.)*—AND the said A. hereby renounces his *jus mariti* and curatorial power and all other right competent to him by law in consequence of the said intended marriage over the property conveyed by him to the said B. in liferent and to the children of the marriage in fee declaring that the same shall not be affectable by the debts or deeds legal or voluntary of the said A. nor by the diligence of his creditors.

(*p*) Bell, Com. as in (*b*); Cuthbertson, 22d Nov. 1799, Har. Hume, 206.

(*q*) Jurid. Styles, 2. 230. The renunciation of the curatorial power or right of administration is recognised in Annand, as in (*r*); but neither in Stair, (as in (*h*), nor Ersk. (1. 6. 13-17.)

(*r*) Annand, 4th March 1774, M. 5844. Here the conveyance was to the wife in trust, for her own liferent, and the children of the marriage in fee, and the *jus mariti* as to the liferent was excluded *provisionally* on the occurrence of the husband's bankruptcy. See Mackintosh, as in (*m*), for an example of the indirect exclusion of the *jus mariti* in a deed of settlement by the wife's father.

(*s*) Bell, Pr. 1562; Keggie, 25th May 1815, F. C. *(Clause.)*—" The " said Dr John Patoun does hereby renounce in favour of the said Isabella " Patoun his *jus mariti*, and all other right or title he has or can claim to the " rents of the subjects in Edinburgh liferented by her, and declares that her " own receipt therefor shall be sufficient exoneration to the tenants of said " subjects or others concerned." It may perhaps be doubted whether the exclusion of the right of administration here was strictly sufficient; and it would seem that the judgment was influenced by the fact that the parties lived separate when the lease was granted by the wife. Henderson, 3d June 1794, Bar. Hume, 202.

(*t*) Jurid. Styles, 2. 230. See above, note (*o*); Robertson, 10th Feb. 1835, S. 13. 442.

(*u*) See Gordon, 16th Nov. 1832, S. 11. 36, where it was held, that a conveyance by the wife of an annuity could not be objected to by the husband, for want of title. The husband had bound himself in the contract to pay to the wife, during their joint lives, an annuity of L.200 *per annum*, " for her own special use and appropriation, exclusive of his *jus mariti* or " right of administration over the same in any manner of way in the lending " out or disposal thereof."

(*v*) M'Donell, 25th Nov. 1819, F. C. *(Clause.)*—" AND FURTHER, it " is hereby expressly provided and declared, that the interests, rents or " yearly income hereby assigned and made over to the said James Clark are " declared to be alimentary, and shall not be attachable or arrestable, or " liable to be affected in any way for his debts or deeds contracted or done, " or to be contracted or done by him at any time hereafter."

(*w*) Ersk. 1. 6. 15; Jurid. Styles, 2. 230. See Dicks, 16th Jan. 1695, and 15th Jan. 1697, M. 5821, 5823. The terms of the decision in this case are of importance, as showing what, in the view of the Court, were paraphernal goods, viz. " The *mundus* or *vestitus mulieris*, viz. all " the body clothes belonging to the wife, acquired by her at any time, " whether in this or any prior marriage, or in virginity or viduity; and " whatever other ornaments or other things were peculiar to her per- " son, and not proper for men's use or wearing, as necklaces, earrings, " breast jewels, gold chains, bracelets, &c.: And that under childbed

"linens, as paraphernal, and proper to the wife, are to be understood only "the linen on the wife's person in childbed; but not the linens on the "child itself, nor on the bed or room, which are to be reckoned as move-"ables; and therefore found the child's spoon, porringer and whistle, con-"tained in the condescendence, are not paraphernal, but fall under the com-"munion of goods; but that ribbons, cut or uncut, are paraphernal, and "belong to the wife, unless the husband were a merchant; and found that "all the other articles, which are of their own nature of promiscuous and "common use either to men or women, are not paraphernal, but fall under "the communion of goods, unless they become peculiar and paraphernal "by the gift and appropriation of the husband to her, such as a marriage "watch, rings, jewels and medals, &c.: But found that a purse of gold, or "other moveables that by the gift of a former husband became properly the "wife's goods and paraphernal exclusive of the husband, are only to be "reckoned as common moveables *quoad* a second husband, unless they be of "new gifted and appropriated by him to the wife again: And found that "such gifts and presents as one gives to his bride before or on the day of "the marriage are paraphernal, and irrevocable by the husband during that "marriage, and belong only to the wife and her executors; but found any "gifts given by the husband to the wife, after the marriage day, are revo-"cable, either by the husband's making use of them himself, or taking them "back during the marriage; but if the wife be in possession of them du-"ring the marriage, or at her death, the same are not revocable by the "husband thereafter: and found cabinets, coffers, and other alleged acces-"sories for holding the paraphernalia, are not paraphernal, but fall under "the communion of goods. Some of the Lords were for making any thing "given the next morning after the marriage paraphernal, called the morning-"gift in our law; but the Lords esteemed them man and wife then, and so "revocable." See Black, 24th Nov. 1803, Bar. Hume, 210, where it was held that articles of household furniture given to a woman by her relations, before her marriage, are not paraphernal. See Wigton, 7th June 1748, M. 5771.

(*x*) Bell, Com. 1. 638.

(*y*) Ersk. 1. 6. 28.

115. CLAUSE EXCLUDING THE LEGAL RETURN (*a*).—1. *General effect.*—(1.) This clause forms part of the ordinary style of the contract, and is equally applicable to antenuptial and postnuptial arrangements (*b*). It is employed to control the rule of law, whereby the legal and conventional provisions, even such it would appear as have been

made by friends of the spouses in contemplation of the marriage, (although not mere presents given on the occasion of the marriage, whether to both or either of the spouses,) lapse by the dissolution of the marriage within year and day after its constitution, without a child having been born who was heard to cry (*c*). The proviso in the clause has been sustained as effectual (*d*); and unless it appear in the contract, the widow, on the premature dissolution of the marriage, has a claim merely for aliment against the husband's heir, and that apparently of a somewhat doubtful description (*e*). (2.) It is, however, to be observed that the arrangement, being wholly conventional, will not have the effect of excluding the legal return of a provision made *intuitu matrimonii* by a relation, unless he give the provision as a party to the contract of marriage, or introduce a similar declaration into any separate deed by which the provision shall be constituted. This observation may apply to a conveyance by one of the spouses to the other, if made in a separate form, unless the clause, as contained in the marriage-contract, be expressed in terms broad enough to embrace provisions other than those constituted in the contract itself. (3.) The reasons expressed in the authority above referred to afford the practical lesson, that this clause ought to be employed even with reference to a provision granted by a relation in favour of one only of the spouses, and without express reference to the marriage (*f*). It is uniformly introduced into the formal marriage-contract as a clause of ordinary style, and, it is believed, is never advisedly omitted. Its exclusion may, on the wife's predecease, give rise to difficult questions in regard to the extent of the claims of her representatives upon the husband for the rents and proceeds of her property consumed in the family.

2. *Terms.*—(1.) The purpose of the clause under

consideration being to exclude the legal return of the provisions consequent on the premature dissolution of the marriage, its terms are interpreted accordingly. Thus, although the proper words of reference to the ruling events are *within year and day without a living child, &c.*, the use of the connecting preposition *or* was held not to affect the manifest object of the clause, and to make it an ordinary clause of return contingent on the non-existence at any time of issue of the marriage, in place of a clause to exclude the legal return in the specified event of dissolution within year and day without a living child having been born before the end of that limited period (*g*). (2.) This clause is restricted in its terms to the contract and its purposes, and will not, as ordinarily expressed, apply to separate deeds, or perhaps even to legal, contradistinguished from conventional rights. It is manifestly proper, therefore, when it is intended that the legal provisions to the wife shall be in all events effectual, or the tocher is not expressly conveyed to the husband or otherwise settled, to add the words, *as well as all provisions and rights otherwise competent by law* (*h*).

(*a*) And it is hereby agreed upon and declared that although the said marriage be dissolved within a year and a day after the solemnisation thereof without a living child having been born of the same yet this contract and whole clauses herein contained in favour of either party shall subsist and continue in full force any law or practice to the contrary notwithstanding.

(*b*) Somerville, 22d Feb. 1751, M. 6161.

(*c*) Stair, 1. 4. 19; Ersk. 1. 6. 38-40, and notes (by Ivory) 167, 168. The conclusion which the learned editor intended, in the first paragraph of note 168, to deduce from the authorities, seems to be, that the doctrine in the text with respect to the provisions alluded to, as subsisting without the aid of express declaration, is not to be held as absolutely fixed; Bell, Pr. 1943, and auth. cited. See Roberton, 22d Jan. 1833, S. See as to the effect of marriage after the birth of a child, Crawford, 20th Jan. 1802, M. 12,698.

(*d*) Garden, 19th Feb. 1743, M. 2271. (*Clause.*)—"And both parties "agree and declare that these provisions on both sides shall stand in full

"force notwithstanding the marriage shall dissolve by the death of either "of the parties within year and day without a living child."

(*e*) See Lowther, 15th Dec. 1786, M. 435.

(*f*) Note (by Ivory) 168, on Ersk. as in (*c*).

(*g*) Campbell, 16th Dec. 1757, M. 2991.

(*h*) See Garden, as in (*d*).

116. TRUSTEES FOR IMPLEMENT (*a*).—(1.) The appointment of certain relations or friends of the wife, as trustees for the purpose of enforcing implement of clauses or provisions in favour of the wife or children, is advisable where these are exigible during the lifetime of the husband; and they may be nominated curators also for the wife, to act in questions occurring between her and her husband (*b*). (2.) The clause, as applicable to the rights of children, has been sustained as effectual after the father's death, even where there existed a separate nomination of tutors and curators for them (*c*).

(*a*) AND ALSO it is hereby agreed and provided and declared that all manner of action and execution shall pass upon this contract for implement of the whole provisions thereof in favour of the said B. and the children of the marriage at the instance of all or any one of the persons after mentioned viz. L. M. and N. and the survivors and survivor of them whom all failing the nearest heir-male of the last survivor who shall be major and resident within Britain at the time.

(*b*) Jur. Styles, 2. 238; Ersk. 1. 6. 21 and 27, *in fine*.

(*c*) Hill, 12th Feb. 1766, M. 16,207. (*Clause.*)—"And, lastly, it is "agreed of consent of parties that all execution shall pass upon the pre-"sent contract at the instance of the said J. N. and C. N. his son, &c. or "any of them, and failing of them at the instance of their heirs or the "heirs of any one of them, for seeing the provisions made effectual in favour "of the said M. N. and the children of the marriage."

117. CLAUSE OF REGISTRATION.—The terms of this clause do not differ from those in an ordinary deed of obligation. See above, § 15.

118. TESTING CLAUSE (*a*).—This clause is in the usual

form. It is to be observed, with respect to the marriage-contract, that when followed by the marriage of the parties, the technical accuracy of the testing clause is not essential to the validity of the deed. (1.) From the favour due to matrimonial arrangements, a contract defective in the solemnities is held to be homologated by the subsequent marriage of the parties, forgery being the only admissible ground of exception (*b*). The Court have even sustained a contract as obligatory on both parties, although subscribed only by the husband, which had been acted on during the marriage as a binding deed (*c*); although, in a later case, the absence of conclusive evidence of consent by the wife to the terms of a document, styled "proposals "of marriage," although followed by the marriage of the parties, produced a contrary result (*d*). (2.) But the effects of the homologation extend no farther than the parties doing the approbatory act and their representatives, *e. g.* it does not validate an informal marriage-contract, so as to bind a third party introduced into the deed as cautioner for the payment of provisions (*e*). (3.) It is not, however, to be assumed, that, even as regards the spouses and their representatives, the testing clause and the formal execution of the deed can be safely dispensed with. Homologation will, in the general case, operate only when the subscription of a party is admitted or established by competent evidence. Hence the practical rule plainly is to complete the marriage-contract in the accustomed form, and with the usual formalities, in order to exclude all risk of future challenge.

(*a*) In witness whereof we have subscribed these presents written on this and the preceding pages of paper duly stamped in terms of law by R. S. clerk to T. U. writer to the signet at Edinburgh the day of 1840 years before these witnesses V. W. and X. Y. both clerks to the said T. U.

(*b*) Ersk. 3. 3. 48, and cases in text; Muir, 10th March 1628, M. 17,014, B. S. 1. 252; Falconer, 14th Jan. 1830, S. 8. 312. See D.

of Montrose, Feb. 1728, M. 16,979, to the contrary, which has thus been rejected as an authority.

(*c*) Wemyss, 16th Nov. 1760, M. 9174.

(*d*) Campbells, 5th June 1812, F. C.

(*e*) Campbell, 15th Dec. 1664, M. 5684, 16,966. The cautioners were for payment of the wife's jointure, and they subscribed the contract by the intervention of only one notary. The marriage was held not to be an act of homologation as regarded the cautioners.

119. GENERAL RESULTS.—1. *As regards the wife.*—It may be deduced from the preceding observations that the objects of the marriage-contract are as follows: (1.) *To exclude or modify the legal provisions flowing from the marriage as a legal contract.*—Parties entering into this solemn engagement acquire rights and privileges which it is in most instances convenient to discharge or materially limit. Their circumstances may differ; and where their means are very unequal, it may be thought sufficient to settle on a husband *obæratus*, or a wife but moderately tochered, either of whom may chance to be the survivor in a very short period, a provision considerably less than what the law would confer, or secured in such a manner as to meet the ulterior views of the party. Where the spouses, again, are nearly matched in worldly substance, although it be, in one sense, highly equitable that the wife should follow the increasing fortunes of the husband, and the husband benefit by the acquisitions of the wife, the weaker and more helpless party should not be left, in the one case, without a certain provision in the event of misfortunes, or, in the other, the more powerful retain without qualification a right which would enable him to absorb the whole of his wife's expected fortune. It may thus be expedient to provide that the wife, besides receiving a special provision by way of jointure, in such a form as to give a *jus crediti* in competition with creditors, shall have right to a particular share of the free succession of the husband in the event of her survivance; although, in modern practice,

an additional provision to the wife is often left to the good-will of the husband, on his acquiring the means of adding to her prospective comfort. On the other hand, the wife's expected acquisitions, when of such amount as to justify a special arrangement, should be so destined as to exclude the husband's influence in whole or in part, in order that they may not wholly merge in his estate—an exclusion which can be effected with certainty only by means of a trust. These arrangements depend obviously in a great measure on circumstances, and the expectations of one or both of the spouses. (2.) *To give reasonable security for the wife's provisions.*—It is plainly fair and equitable that the wife, in accepting a provision less than what the law would probably confer, should have combined with it that security for its payment which can be given only by means of conventional arrangements. It may not be convenient that the husband, out of his own means, shall set apart a sum to be invested in heritable or other security for answering the wife's annuity; but he can in all circumstances confer on her a *jus crediti;* so that, as his creditor, she may receive the full provision, or a share of his means proportional to its amount, according to the diligence done for securing it.

2. *As regards the children.*—The advantages of the conventional arrangement by contract with reference to children are very great. (1.) *By excluding the legitim, and settling on them a special provision.*—By this means the father retains the power of so apportioning the provisions amongst the children, as to give a larger share when circumstances call for its application, *e. g.* for advancing a son in a profession, or giving a daughter advantageously in marriage,—objects which the artificial structure of modern society render very subject to the influence of circumstances. Or it may be convenient to restrict the share of a particular child afflicted with bodily or mental weak-

ness, to a sum merely necessary for comfortable subsistence. It is always in the father's power to dispose of the rest of his means among his children by settlement, so as to increase their provisions. (2.) *By propelling the term of payment of provisions.*—It may be convenient to declare provisions to children, whether made out of the father's means or the mother's tocher or estate, to be payable at their majority or marriage. In such arrangements it is of course assumed that the spouses can, without inconvenience, secure the necessary fund at the time of the marriage, or at least advance it when the terms of payment of the several shares respectively arrive. (3.) *By conferring a jus crediti.*—It has been seen that the most ample provision for children may fail in effect, unless conceived in terms sufficient to give a right of action during the father's lifetime. Misfortunes may deprive the wealthiest of their whole property; and therefore, when it is inconvenient to set apart a specific fund on an investment in the names of trustees for behoof of children, it is in all cases desirable so to confer the provision as to make the children proper creditors of the father, and not merely of his estate;—an arrangement called for by the intimate relationship of the parties, and the unprotected and dependent state of children on the occurrence of misfortunes. Although they cannot acquire an absolute preference for their provisions, unless by means of arrangements which imply the setting apart a specific fund upon a separate investment, it requires only certain technical expressions to give them a title to be ranked on the estate of the father as proper onerous claimants, or to acquire a preference by means of diligence. (4.) There are other arrangements often of a complex nature which may be called for by special circumstances. These it would lead too much into detail to notice. Reference is made to the style books.

## TITLE II. POSTNUPTIAL CONTRACTS AND PROVISIONS.

120. FORM AND EFFECT.—1. *Form.*—In this respect the postnuptial does not greatly differ from the antenuptial contract of marriage (*a*). But, (1.) The introductory clause ought to bear the true cause of granting, such as, that there was no contract executed by the parties before marriage, as well as the mutual inductive considerations. (2.) The clause excluding the children's legitim will be omitted, as such exclusion is only competent before marriage unless with consent of the children when of full age, and then it takes the form of a discharge. (3.) The conveyance by the wife of moveable property (unless enjoyed to the exclusion of the *jus mariti*) would be superfluous, such property having passed to the husband under the legal assignation implied in marriage. (4.) A clause excluding the legal return need not be introduced after the expiry of a year and a day from the date of the marriage.

2. *Effect in questions between the parties and their heirs.*—(1.) The postnuptial contract is not in itself an onerous deed, like the antenuptial, which being entered into prior to the change in the *status* of the parties, and with a view to that change, the provisions and stipulations expressed in it are proper conditions of the marriage. But by the marriage, whether with or without a contract, the rights of the parties have been subjected to control, either legal or conventional, whereby particular privileges and claims have arisen to them that cannot by law be yielded up so as to exclude the power of revocation, without a full equivalent, or at least such a consideration as is rational in the situation of close affinity in which the parties are placed (*b*), unless in the deed or contract

by which the donation is conferred, a *jus quæsitum* is constituted in favour of a third party (*c*). The same rule applies to provisions in contracts of voluntary separation. (2.) A material distinction maintains, however, between the rights conferred by a postnuptial contract entered into by spouses who married without a contract, and those acquired by parties to a similar deed whose affairs formed the subject of conventional arrangement before marriage. In the former case, a provision by the husband, although not purchased by any adequate consideration, has in repeated instances been sustained as irrevocable, unless to the extent of the excess over a competent provision, on the ratio that he is under a natural obligation to provide for his widow (*d*); a course which is not opposed by the decision in a later case, since the deed, which was sustained as importing a revocation, gave the wife the liferent of the husband's whole means (*e*). And the principle has more recently been recognised, that the revocation of a postnuptial provision by the husband is competent, which has the effect of throwing the widow on her legal rights, provided these are adequate for her maintenance (*f*). But a conveyance by the wife, who lies under no corresponding obligation, made without rational cause, is revocable as a pure donation (*g*). Where, on the other hand, the rights of the spouses have been deliberately settled by antenuptial contract, it behoves that the grant on either side shall be in substance remuneratory to exclude the power of revocation (*h*), and, *in dubio*, donation seems to be presumed, although the contrary may be established; but a statement of onerosity in the narrative of the deed is not to be relied on (*i*). (3.) Revocation, when competent, may be made by the donor at any time, even after the dissolution of the marriage, although not by representatives. The right being pendent on his own will, becomes absolute, or (according to Balfour) is ratified by his death (*k*). But

an exception has been received in favour of the children of the husband by a former marriage, acquiring a right from the wife, which cannot be revoked after the husband's death (*l*). (4.) Revocation annuls not only the right itself, but all rights flowing from the donee, and that upon the maxim, *resoluto jure dantis resolvitur jus accipientis*—a rule which not only applies to voluntary transmissions, but has been extended to legal diligence done by creditors for attaching the subject gifted (*m*). (5.) Provisions, or discharges of provisions by contract or other postnuptial grant, that are truly donations, may be revoked either expressly or tacitly—by deed of resumption in favour of the donor, or by a conveyance of the right to a third person; or even by the contraction of debt, to the effect of conferring on the creditor a title to attach the subject (*n*); but the discharge of a legal provision, such as the *jus relictæ*, is to be distinguished from the discharge of a conventional provision, itself subject to revocation *quoad excessum*. The former is revocable absolutely; but the latter, being equivalent to revocation by the other spouse of such conventional provision, cannot be recalled if an adequate provision remains to the wife (*o*). (6.) Substantial interest in a stranger, as one of the contracting parties, bars the power of revocation (*p*). (7.) The renunciation of the right to revoke, being itself essentially a donation, is ineffectual (*q*).

3. *Effect in questions with creditors.*—(1.) Where the parties have not entered into an antenuptial contract, the general rule seems to be, that marriage, being an onerous cause, will support a future moderate provision to the wife as coming in place of a contract, to the effect of a subsistence according to the circumstances of the parties, even although made by the husband when *obæratus*—a case which does not seem to be distinguished by any marked features from a provision by postnuptial contract, in competition with future creditors; although the question

of solvency is always relevant, since what is rational in point of amount is in the judgment of the Court or a jury, and may be affected by circumstances. It is not, however, to be supposed, that the provision is even to this extent absolutely preferable: it is ranked according to the nature of the security or diligence obtained or used for its protection or recovery (*r*). (2.) But where a provision has been constituted by antenuptial contract, no instance has been found of an addition to it, after marriage, being sustained in a question with creditors; although a security for an antenuptial provision, given to the wife during the marriage, will be sustained in competition with creditors, notwithstanding the husband's insolvency at the time, as granted for a just cause (*s*). The widow cannot, however, avail herself of both provisions; and as it seems to have been assumed that the latter provision must be no more than reasonable, it is thus of such a nature as to be sustained, even were the former out of view (*t*).

(*a*) Jurid. Styles, 2. 205.

(*b*) Stair, 1. 4. 18; Ersk. 1. 6. 29, 30; Bell, Pr. 1616, and auth. cited; Brownlee, 11th July 1735, Elch. *Presumption*, 5; Hepburn, 6th June 1814, Dow, 2. 342. See Henderson's Trs. 27th Nov. 1833, F. C., S. 12. 133.

(*c*) See as to effect of an interest in a third party, M. 6106, *et seq.*; Scott, 10th Aug. 1776, M. 6108, and App. *Husband and Wife*, No. 1, as reversed on ap.; Lord Moncreiff, in Jardine, 17th June 1830, F. C., S. 8. 937.

(*d*) Ersk. as in (*b*); Lindores, 18th Feb. 1715, M. 6126; M'Phersons, 3d Jan. 1750, M. 6113. According to Balfour, *v. Conjunct Fie*, c. 1, a donation by the husband, after the marriage, was revocable if it exceeded the quantity of the tocher-gude.

(*e*) Steven, 1. Feb. 1809, F. C.

(*f*) Gaywood, 3d June 1828, F. C., S. 6. 909. See opinion of Lord Glenlee.

(*g*) Ersk. as in (*b*); Chalmers, 25th July 1710, M. 6056; Mackintosh, 7th Dec. 1838, F. C., D. B. M. 1.

(*h*) Stair, Ersk. as in (*b*); Leslie, 5th July 1576, B. S. 1. 556; Shearer, 13th July 1733, M. 6121; Stewart, 22d Nov. 1769, M. 6100; Scott, as in (*c*); Lord Moncreiff in Jardine, as in (*c*); Thomson, 20th Feb. 1838, F. C., D.

(*i*) Bell, Pr. 1616; Jardine, 17th June 1830, F. C., S. 8. 937.

(*k*) Balfour, *v. Conjunct Fie*, c. 1. The following quaint reason (very different from the reason of the civil law, *ne mutuato amore invicem spoliarentur*) is given by the President for refusing effect to donations: "*Item*, All other "kind of donations is forbidden be the law to be usit except it be tocher or "conjunct-fie, (jointure); because gif ather of thame desyrit onie gift of "the uther, and war refusit thairof, the samin refusal wer ane occasioun "to stop and quenche mutual love betwix thame;" Stair, 1. 4. 18; Ersk. 1. 6. 32; Bell, Pr. 1617, and cases cited; Jurid. Styles, 2. 241.

(*l*) Gentles, 23d June 1826, S. 4. 749.

(*m*) Sinclair, 17th Jan. 1739, B. S. 5. 658.

(*n*) Ersk. 1. 6. 31; Bell, Pr. 1618, and auth. cited.

(*o*) Gaywood, 3d June 1828, F. C., S. 6. 909.

(*p*) Bell, Pr. as in (*i*).

(*q*) Jardine, as in (*i*).

(*r*) Ersk. 4. 1. 33; Bell, Com. 1. 641, *et seq.*, and auth. cited; Christie, 19th Jan. 1839, F. C., D. B. M. 1. 396. In the case of Campbell, 26th July 1744, M. 988, Elch. *Fraud*, 12, noticed by Mr Bell, (Com. 1. 642, note 2,) there was no antenuptial contract, but a mere communing before marriage. It is probable that the word *with*, in Mr Bell's note, is a misprint, and that the correct reading is, "without an antenuptial contract." See Pitsligo's Crs. 9th Jan. 1694, B. S. 4. 117; Urquhart's Creditors, 8th Nov. 1737, Elch. *Fraud*, 8; Jeffrey, 24th May 1825, S. 4. 32. In Robertson, 11th Jan. 1738, M. 957, the "Lords found the provision in ques-"tion granted to the wife after marriage to be a rational and onerous "deed, there having been no precedent contract, and therefore does not "fall under the act 1621."

(*s*) Ersk. Bell, as in (*r*); Mackenzie, 17th Feb. 1738, M. 958; Campbell, 14th Feb. 1778, M. 4000.

(*t*) Mackenzie and Campbell, as in (*s*).

121. FORM AND EFFECT AS RESPECTS CHILDREN.—1. *Form.*—Postnuptial provisions to children are in the form of bonds of provision, or constituted by clauses embodied in postnuptial contracts, or introduced into their own contracts of marriage. As respects bonds of provision, the substantial part of the clause of obligation will be expressed with due regard to the rules referred to above, (§ 105, *et seq.*)

2. *Effect.*—(1.) In questions with the granter's re-

presentatives, provisions to children, whether ante or postnuptial, are valid according to their constitution and the completion of the deed. Contracts of marriage are incapable, from their nature, of delivery, and, as mutual deeds, are effectual from their dates; and bonds of provision undelivered are presumed to be held by the father for behoof of the favoured children (*a*); although not (in the event of their predecease) of their heirs-general, unless, by the conception of the deed, the provision had vested; (above, § 105.) (2.) Again, as regards creditors, the question may depend upon various elements of decision. It is true that postnuptial provisions to children, whether *nati* or *nascituri*, are not necessarily onerous, in questions with creditors of the father in prior debts; but the father may, when solvent, absolutely secure his children *in bona fide* provisions, according to his means, or grant them obligations for payment, which, if prestable during the father's lifetime, either as to principal or interest, will, by force of the *jus crediti* thus conferred, enable the children to compete with creditors according to the nature of their diligence (*b*). (3.) But if the provisions be by bond, delivery anterior to the contraction of the debts producing insolvency must be instructed, in which case they are valid if granted *bona fide* (*c*): in questions with anterior creditors, the solvency of the granter is an essential element in the validity of bonds of provision, and the *onus* of proving it lies on the children (*d*). (4.) Where, on the other hand, the provision is made in the child's contract of marriage, it is onerous as a condition of the marriage, and of the counter stipulations of the contract; and the more especially if the child have, in consideration of the provision, discharged the legitim, or any other claim competent against the father (*e*). A provision thus obtained by way of purchase has been sustained as valid against creditors, even although payable after the father's death (*f*).

(*a*) Stair, 1. 7. 14; Ersk. 4. 1. 34.

(*b*) Stair, 3. 7. 2; Ersk. 4. 1. 34, and note (by Ivory) 23; Bell, Com. 1. 642; E. of Queensberry, 5th and 6th Jan. 1677, M. 961; Douglas's Crs. 20th Dec. 1682, B. S. 4. 138; Jeffrey, 24th May 1825, S. 4. 32. See Crs. of Hay, 21st July 1742, M. 929.

(*c*) Stair, 1. 5. 6, 1. 7. 14; Ersk. as in (*b*).

(*d*) Stair, as in (*b*); Blackbarony, 10th Feb. 1715, M. 972; Cult's Crs. 15th Aug. 1783, M. 974.

(*e*) Ersk. 4. 1. 33; Blackburn, 29th May 1816, F. C., Scott, 12th June 1822, S. 1. 481; Garden, 26th Nov. 1822, S. 2. 39; Gordon, 9th Feb. 1833, F. C., S. 11. 368, and auth. cited. See note of Lord Moncreiff.

(*f*) Gordon, as in (*e*).

## TITLE III. CONTRACT OF SEPARATION.

122. CLAUSES.—The clauses of the contract of separation, as exemplified in the Juridical Styles, are as follows: viz. 1. *The inductive clause.* 2. *Obligation on the husband to pay an alimentary allowance to the wife.* 3. *Obligation on the wife to reside separate from the husband.* 4. *Acceptance by her of the aliment.* 5. *Consent by her to inhibition.* 6. *Appointment of a curator for execution against the husband.* 7. *Renunciation by both parties of right to bring action of adherence.* 8. *Clause of registration for execution.* 9. *Testing clause.*

123. INTRODUCTORY CLAUSE (*a*).—The deed sets out with a general statement that the parties had resolved on a separation. It is unnecessary to recite the particular circumstances which have led to this step: it is enough that the parties have resolved to execute the deed.

(*a*) IT IS CONTRACTED and finally ended between A. on the one part and B. his wife only daughter of C. on the other part to the effect following viz. that is to say the said parties having resolved on a separation in the following terms.

124. OBLIGATION FOR ALIMENT (*a*).—1. *Form.*—The

style to which reference is made assumes that the wife is the spouse on whom aliment is to be bestowed. If it should happen that the husband is *obæratus* and the wife possessed of property in regard to which the *jus mariti* has been excluded, the most eligible form is by an obligation on the wife, consented to by the husband, to pay out of her separate estate to a trustee or trustees for the husband, a yearly sum in name of aliment, not to be affectable for his debts. A direct obligation by the wife to pay an annuity to the husband would at least be anomalous, and might give rise to difficult questions.

2. *Effect.*—(1.) The wife acquires a preference in bankruptcy only when the provision is granted during solvency, and there is afterwards complete non-intercourse on the part of the spouses, so as to exclude the presumption that the provision, although set apart nominally for her aliment, is truly intended for the husband's support (*b*). But a *bona fide* provision by a husband solvent at the time, seems to be effectual to the wife according to the diligence or investment employed for securing it (*c*). (2.) Nor is a provision by contract directly revocable as a donation by one who persists in living apart; but in the ordinary case express revocation appears to be competent to either spouse if willing to renew the union. And the contract is virtually revoked by the reunion of the spouses, or an offer on the part of the husband to receive the wife again into his family. Revocation, whether virtual or express, is excluded, however, in those cases where the separation shall have proceeded from harsh usage, or other grounds sufficient to warrant a judicial separation (*d*). (3.) As the power to revoke depends upon the will of the spouses to renew the union, it cannot be attached by creditors (*e*). (4.) The wife may sue or use personal diligence in her own name for recovery of the arrears of an alimentary provision of this nature, in like manner as for

aliment awarded by judicial authority, for otherwise it would be no better than a voluntary or revocable provision (*f*); and it is thus distinguished from a mere claim of aliment not sanctioned by contract, for which action by a wife, in a state of voluntary (contradistinguished from legal) separation, has been refused as incompetent at her sole instance (*g*); although the appointment of a *curator ad litem* seems to obviate the difficulty in point of form (*h*). It would thus appear that the exclusion of the *jus mariti* and curatorial power are implied in a separation *bona gratia*; but the express exclusion of these may be introduced into the contract (*i*). (5.) Mutual stipulations in a contract of separation seem to be regarded in the same light as if contained in any other postnuptial deed, since arrangements of this nature go beyond the proper objects of the deed. For example, a discharge by the wife of her legal provisions, although effectual when the mutual considerations are in a fair proportion, is revocable as a donation even after the husband's death, on the ground of great inequality and concealment of his circumstances (*k*). (6.) As a contract of separation is, from its nature, a mere temporary expedient, where the circumstances are such as to justify a legal separation, the wife, by entering into that arrangement, is not precluded from still insisting in an action of judicial separation *a mensa et toro* (*l*).

(*a*) THEREFORE on the one part the said A. hereby binds and obliges himself to make payment to the said B. for her separate maintenance and aliment of an annuity of L. sterling at two terms in the year Whitsunday and Martinmas by equal portions during their joint lives and whilst the said B. continues to live separately from her said husband beginning the first term's payment at next for the half-year now current the next term's payment at the term of next for the half-year preceding and so forth yearly termly daily and continually thereafter during the joint lives of the said A. and B. and their separation as said is with L. sterling of liquidate penalty for each term's failure in punctual payment of the said annuity and the legal interest of each moiety from the term of pay-

ment thereof during the not payment And the said A. hereby engages never to revoke suspend or delay payment of the said annuity to his said spouse upon any pretext whatever and declares that her own receipts alone shall be sufficient discharges thereof as the same falls due.

(*b*) Bell, Com. 1. 643; Winter, 21st July 1772, Hailes, 496.

(*c*) Bell, Com. as in (*b*); M'Gregor, 22d Jan. 1820, F. C. and auth. cited. Mr Bell seems to consider the decision in this case to have proceeded on the ratio that the decree-arbitral conferred a *jus crediti*. But this does not appear from the report to have had any farther influence than as an element in the question of *bona fides*.

(*d*) Ersk. 1. 6. 30, and note (by Ivory) 163; Bell, Com. 1. 643. See Palmer, 25th Jan. 1810, F. C.; Lawson, 15th June 1830, S. 8. 923; Shand, 28th Feb. 1832, S. 10. 384, and note of Lord Moncreiff.

(*e*) M'Gregor, as in (*c*).

(*f*) Ersk. 1. 6. 21, and note (by Ivory) 153. See M'Gregor, 25th Feb. 1837, D. 15. 681.

(*g*) Bell, 22d Feb. 1812, F. C.

(*h*) Kelly, 2d July 1831, S. 9. 872. See Gray, 7th Dec. 1832, S. 11. 185; Derby, 24th Jan. 1833, S. 11. 305, where the objection does not appear to have been taken. On the merits, the claim seems to depend on the degree of provocation given by the husband, which must be sufficient to warrant legal separation, and on his solvency.

(*i*) See Keggie, 25th May 1815, F. C.

(*k*) Palmer, as in (*d*); Dickson, 1st Feb. 1827, F. C., S. 5. 266, affd. W. S. 5. 455.

(*l*) Lawson, 28th Nov. 1797, M. 6157.

125. OBLIGATION BY THE WIFE TO LIVE SEPARATE (*a*). —This clause is ineffectual, since the power of revocation is a right inherent in the married state, and incapable of renunciation; (above, § 120. 1.)

(*a*) AND ON THE OTHER PART the said B. hereby obliges herself to withdraw and continue withdrawn and absent from the said A.'s family during their joint lives until the parties shall by mutual consent again agree to live together as married persons.

126. ACCEPTANCE OF THE PROVISION (*a*).—The wife's acceptance of the provision by an express clause is plainly superfluous. It is implied from her joining in the deed. Nor is it necessary that she should come under an obliga-

tion not to contract debt which shall affect her husband and his estate. A private agreement of this nature cannot prejudice third parties, or supersede the rule of law that the husband is liable for the debts of his wife, if it is to be considered as still in operation while she has a separate residence and allowance (*b*).

(*a*) AND she hereby accepts of the said yearly sum of L. in full of all claim for separate aliment board clothes or other necessaries and expenses of every description which she could demand by law from the said A. as his wife during their separation AND she binds and obliges herself not to contract or take on any debts or sums of money so as to become the foundation of any legal demand against the said A.

(*b*) Ersk. 1. 6. 25. See Wallace, 18th May 1821, S. 1. 20; Norman, 6th July 1826, S. 4. 799; Buie, 23d Feb. 1827, S. 5. 464; Buie, 9th July 1831, S. 9. 923.

127. CONSENT TO INHIBITION (*a*).—This is another example of a superfluous clause. Inhibition is competent to the husband at his pleasure, and therefore for the wife to consent to the use of that diligence is plainly unnecessary. If the separation of the parties, and an independent allowance to the wife, should practically relieve the husband from liability, then inhibition need not be resorted to; but, on the other hand, if the husband would otherwise be exposed to annoyance, he may use the ordinary remedy.

(*a*) AND the said B. also consents that her said husband shall if he see fit raise execute and record letters of inhibition against her.

128. APPOINTMENT OF A CURATOR (*a*).—It may be advisable and convenient, although it is by no means essential, to introduce a clause of this nature; (above, § 124. 2.)

(*a*) AND it is hereby declared that all execution necessary shall pass against the said A. upon these presents for payment of the said annuity at the instance of D. whom failing her nearest blood relation who shall be major and within Great Britain for the time.

129. RENUNCIATION OF ACTION OF ADHERENCE, &c. (*a*). —The effect of this clause is extremely doubtful; for it seems to be a necessary ingredient in an agreement for voluntary separation, that either party may put an end to it at pleasure, as contrary to the relation of marriage, and the rights and duties of the married state, excepting where harsh usage on the part of the husband has forced the wife to withdraw herself from his family, in which case the wife, as she has grounds for suing for a judicial separation, is not bound to adhere.

(*a*) AND LASTLY each of the said parties hereby renounces any action of adherence or of aliment competent by law at the instance of either of them against the other and whole effect thereof and in case any such shall be raised it is agreed that these presents shall afford a conclusive defence against the same.

130. CLAUSE OF REGISTRATION.— } These clauses are
131. TESTING CLAUSE. } expressed in the ordinary words of style.

# CHAPTER V.

## DEEDS OF EXTINCTION.

### TITLE I. DISCHARGE.

132. Introductory remarks.—1. *Origin.*—It is observed by Mr Ross (*a*), that "discharges are coeval with "obligations." But the truth in all instances of the observation would imply that the term discharge is synonymous with extinction; for obligations are extinguished by novation, compensation and other modes known to the law, which may be evidenced otherwise than by a voluntary deed of discharge granted by the creditor. Thus, as it is enough that legal evidence can be produced that a debt no longer subsists, a decree-arbitral, whereby one party is ordained to grant a discharge to another, has been held equivalent to a formal discharge, even in a question with an assignee (*b*). Thus also a deed, which establishes novation, or the constitution of a new obligation in place of the old, is equally effectual as a discharge to extinguish the latter as a ground of action (*c*). The formal discharge, indeed, instead of being the best, or even the chosen evidence of the implement of an obligation, arose out of the necessity of particular cases, and was employed solely when the ordinary evidence was not available to the parties. Among the Romans the common mode of its extinction was by the cancellation or redelivery of the obligation, without any written acknowledgment of payment or satisfaction. Obligations were in the civil law chiefly constituted by verbal stipulations; but in the later practice of the Romans, they also employed writing, and

we find the words *epistola cautionis*, or simply *cautio*, used to designate a written undertaking to repay money received in loan (*d*). As the obligation was completed by the delivery of the writing, so on the other hand was it dissolved by its re-delivery, *Si debitori meo reddiderim cautionem, videtur inter nos convenisse ne peterem.* And even at the present day our law admits the force of the maxim, *Quod chirographum apud debitorem repertum præsumitur solutum* (*e*); nor is it of an old date, that the simple cancellation, or as it is called in law language, the *retiring* of the bond, was a common mode of extinguishing the obligation (*f*). It might happen, however, that the obligation was amissing, and to meet this case, a document (which in the styles of the middle ages received the title of *evacuatoria*) was granted by the creditor to the debtor, wherein he undertook in special terms that the particular obligation should be held as cancelled, or generally, *omnes cautiones ex quocunque contractu vanæ et pro cancellato ut haberentur.* The terms of the *evacuatoria* or discharge are substantially to the same effect (*g*). It seems evident, therefore, that the more verbose form of the discharge, which we meet with in the collection of styles by Dallas of St Martins, must have been framed at a later period, probably by our clerical notaries (*h*). It is even more prolix than the earlier form quoted by Mr Ross from Rymer as belonging to the reign of James III., whereof the releasing terms are by no means superabundant (*i*). The word *discharge*, although apparently derived from the French *decharger*, is not the term used in France for the same deed, which is *quitance*, and agrees with the word *acquittance* employed in English conveyancing. But it appears that the same word indifferently, or in collocation with *discharge*, was at a former period common in our practice (*k*).

2. *Purpose and form.*—(1.) The discharge is a deed

of extensive use in practice, and the leading terms and the principles of construction by which they are interpreted are universally applicable. Thus the discharge is the deed whereby factors, tutors and curators, trustees and others performing special duties of a private nature, are exonerated from their responsibilities. These and other situations in which the deed is applicable are exemplified in the style book (*l*). It is only the discharge of a bond, as the type of this class of deeds, that falls more immediately under our notice. (2.) The purpose of the discharge of a money claim, which, it has been seen, is not essential to the extinction of the debt, is to put the debtor in possession of the best evidence for contradicting the averment by any party having interest, that the document of debt had come again into his possession by surreptitious means. Discharges were ordinarily written at the end of the bond, until the operation of the stamp laws in a great measure superseded this form. It may still be employed, omitting the clause of registration, a separate receipt being granted for the money, bearing the proper stamp (*m*); and indeed more effect is generally attributed to the formal discharge, (which must bear the stamp of a deed,) than seems to be due to it. (3.) It is no doubt true that the clause of registration is the practical test of a writing being a *deed* in the sense of the stamp laws; but it is difficult to conceive any state of circumstances in which it can be of importance to place the discharge of a moveable claim on record, unless where the bond which is the subject of the discharge has itself been registered as a deed, and thus permanently deposited in the hands of the keeper of the registers, or been followed by inhibition or adjudication. And even this rule of practice appears to be unjust towards the creditor, for it assumes that a debtor who has himself been the cause of the registration for diligence of the document of debt by delay in payment, or of the use of inhi-

bition or adjudication, may on account of such proceedings demand from the creditor a more formal, and thus a more expensive discharge than if he had made payment before the obligation had been placed *in publica custodia*, or made the foundation of real diligence. The difficulty would in part be removed, by adopting the form of returning the document of debt to the debtor, out of the register, on a written consent by the creditor, a practice which was to a certain extent followed in Spottiswoode's time (*n*); or marking the discharge on the margin of the entry in the register-book of the bond itself, so that no new extract should be issued. This latter form is customary with respect to inhibitions; and thus the discharge of an inhibition may it is thought be competently expressed in a simple receipt for the debt on which it has proceeded, as being a necessary consequence of the extinction of the debt itself. Indeed it would appear to be wholly unnecessary to grant a writing more formal than a holograph or duly attested receipt, or acknowledgment of satisfaction, so as to afford evidence that the document of debt was voluntarily restored, unless where its non-delivery is attributable to the creditor himself; the debtor, at his own expense, having right to a discharge in any form he may prefer.

3. *Expense of the discharge payable by the creditor.* —(1.) The question in regard to the form of the discharge assumes its interest chiefly from the professional rule, that the debtor may require a sufficient discharge at the creditor's expense, unless it has been otherwise stipulated in writing. For as only a formal deed bearing a clause of registration can be recorded in the register of deeds, and such a deed must bear a stamp of a particular denomination, it is obviously of importance to establish a practical rule such as that above suggested, (Art. 2.) for determining whether a formal *deed of discharge* or only a *receipt*, which is a shorter document and bears a stamp of a much

lower denomination, must be granted by the creditor. (2.) The expense of the discharge of a legacy includes, besides the professional fees, the duty payable to Government on the legacy, which has been regarded as in effect a stamp duty (*o*).

(*a*) Ross, 1. 212.

(*b*) L. Elphingston, 10th Dec. 1623, M. 16,472.

(*c*) Chisholm, 6th Dec. 1632, M. 16,472.

(*d*) D. 2. T. 14. *de pactis.*

(*e*) Ersk. 3. 4. 5.

(*f*) Spottiswoode's Styles, 58.

(*g*) Forms of Marculfus, L. 2. No. 35. "Domino fratro illo ille. Omnibus non habetur incognitum qualiter ante hos annos (aut ante anno) solidos nostros numero tantos ad beneficium accepisti et cautionem nobis pro hoc emisisti ut ipsos solidos tunc nobis reddere deberes. Quod et ita fecisti. Sed dum illa cautione quod nobis emiseras ad præsens non invenimus, ideo tibi hanc epistolam evacuaturiam fecimus, ut de ipsis solidis tantum omni tempore ductus et absolutus resideas; et si ipsa cautio apparuerit, vel a nobis aut hæredibus nostris quoquo tempore ostensa fuerit, nullum sortiatur effectum, sed vacua et inana permaneat."

(*h*) Dallas, p. 4. "BE IT KEND to all men by thir present letters me P. G. to whom and in whose favours the bond after specified and sums of money therein contained are assigned and transferred in manner after mentioned; FOR ASMIKLE AS A. B. as principal and C. D. as cautioner for him by their bond dated the day of years" (*narrative of the bond, &c.*): "AND NOW SEEING the said A. B. principal party foresaid has instantly made payment to me as having right in manner foresaid of the said principal sum annualrent resting preceding the date hereof and expenses necessarily debursed in the said matter; whereof I hold me well content satisfied and payed and renunces the exception of not numerate money, and all other exceptions and objections of the law whatsoever that may be proponed or aledged in the contrair, by thir presents for now and ever: THEREFORE wit ye me as having right in manner foresaid to have exonered quite claimed and *simpliciter* discharged; Likeas I by thir presents exoner quite claim and *simpliciter* discharge the said A. B. and his said cautioner, and their heirs, executors successors and intromitters whatsomever, of the foresaid bond decreet interponed thereto, sums of money principal annualrents and expenses respective above specified therein contained, and of all letters of horning, caption, inhibition, arrestment, and others raised thereupon, with

"the executions, indorsations and registrations thereof, and of all action, "pursuit, instance and executions whatsomever, competent, or that may be "competent to me thereupon, with all that has followed or may follow upon "the same, by thir presents for now and ever: AND I bind and oblige "me, my heirs, executors and successors, to warrant, acquit and defend this "present discharge to be good, valid and sufficient to the said principal and "cautioner and their foresaids for their exoneration of the premises at all "hands and against all deadly as law will: AND CONSENTS that the said "principal and cautioner be relaxed from the horn, whereunto they are "denunced for the cause foresaid, by way of suspension or otherwise, as "accords, and that but caution or consignation; and for the more securitie "we are content and consent thir presents be insert and registrat in the "books of Council and Session," &c. *(in the old form.)*

(*i*) Ross, 1. 214. "Jacobus, Dei Gratia Rex Scotorum, universis et sin-"gulis ad quorum notitias præsentes literæ venerint, salutem: Sciatis nos "recepisse ab excellentissimo Principe Edwardo, Rege Angliæ, nostro consan-"guineo carissimo, per manus discreti ac magnæ prudentiæ clerici, Magistri "Alexandri de Lye, dicti consanguinei carissimi nostri Elimosinarii, in Ec-"clesia Beati Egidii de Edinburgh, tertio die mensis Februarii anno Domini "millesimo quadragentesimo septuagesimo quinto, summam duarum millium "marcarum bonæ et legalis monetæ Angliæ, in partem solutionis summæ "viginti millium marcarum ejusdem monetæ, nobis per prefatum nostrum "consanguineum carissimum, cum illustri Principessa Cicilia, sua juniori "filia, nomine dotis et causa matrimonii cum illustri Principe Jacobo, nostro "primogenito hærede et filio unico carissimo, debitarum, prout in indenturis "inter nos et dictum consanguineum carissimum inde confectis latius con-"tinetur: De qua quidem summa duarum millium marcarum monetæ pre-"dictæ, fatemur nos bene pacatos contentos et plenarie in pecunia nume-"rata persolutos, et dictum eccellentissimum Principem Edwardum, Regem "Angliæ, suosque hæredes et successores, ac regnum ejusdem, pro nobis, "hæredibus et successoribus nostris, ac regno nostro, de eadem summa dua-"rum millium marcarum quietos clamamus, et in perpetuam exoneramus, "per presentes."—*Rymer*, vol. 3. part 3. p. 58.

(*k*) Spottiswoode's Styles, *v. Discharge and Acquittance.*

(*l*) Jurid. Styles, 2. 360, *et seq.*

(*m*) Jurid. Styles, 2. 365.

(*n*) Spottiswoode, as in (*k*).

(*o*) Fischer, 18th Nov. 1825, F. C., S. 4. 192. See 36 Geo. III. c. 52, § 6, 24, 27 and 28.

133. CLAUSES OF THE DISCHARGE.—The clauses in the form under consideration are as follows: 1. The *Narrative clause.* 2. *Clause expressing the mode of extinction.* 3.

*Clause of discharge.* 4. *Clause of warrandice.* 5. *Clause of delivery of the bond, &c.* 6. *Clause of registration.* 7. *Testing clause.*

134. NARRATIVE CLAUSE (*a*). — The purpose of this clause is to identify the creditor and the grounds of debt discharged, and with that view, to narrate all transmissions of the obligation. But it seems superfluous to encumber the narrative with a description of proceedings by action or diligence, other than inhibition or adjudication. (See below, § 136. 1.) (1.) In this part of the deed are expressed the name and designation of the granter or creditor, whether original, by assignation or by succession. When the document of debt and its transmissions are detailed, as is usual in this clause, it is unnecessary to add to the name and designation of the creditor the term *executor*, *assignee*, or other character held by him, which is more fully expressed in the narrative itself. (2.) The powers of a party not in right of the obligation, but representing others, such, for example, as a factor, ought to be fully expressed in the deed under which he proposes to act; and it is no valid objection that it is not tested according to the forms of our law, if authentic by the law of the granter's domicil (*b*). (3.) Where, again, the powers cannot be clearly deduced from the terms of the commission, the conveyancer must act with caution in managing the transaction. For even were it clear that the powers of the party, (*e. g.* a foreign guardian,) may competently be ascertained by means of the evidence of foreign lawyers, and that they were thus sufficiently proved to be co-extensive with those belonging to one holding a similar character in Scotland, they might still fail in effect from the want of some technical form required by our law. Thus, in a case where a guardian, appointed in England, proposed to discharge a Scotch heritable bond due to his

ward, it was necessary to show not only that his powers by the law of England extended to acts of equal importance, but that he had qualified himself to exercise the office of tutor by making up inventories under the Scotch statute of 1672, c. 2 (*c*). The mode of narrating the bond, &c. is exemplified in the notes. See as to variations arising from the status of the granter, above, § 11.

(*a*) I A. CONSIDERING that B. by his bond dated acknowledged to have borrowed and received from me the principal sum of L. sterling which sum the said B. bound and obliged himself his heirs executors and successors whomsoever to content and repay (*the obligatory clause of bond shortly stated*) as the said bond bears.

(*b*) Ersk. 3. 1. 39, 40.

(*c*) Young and Co. 8th July 1831, F. C., S. 9. 920. A doubt may perhaps remain whether a foreign guardian can competently make up inventories in Scotland, unless the deed under which he acts confer on him, in express terms, the *powers competent to a tutor and curator by the law of Scotland*,—how far, in short, the evidence of foreign lawyers can be received in proof of the adequacy of the powers belonging to the guardian, when not expressed in the instrument.

135. CLAUSE EXPRESSING THE MODE OF EXTINCTION (*a*). —(1.) This clause is of importance, as showing the inductive cause of the discharge. Obligations may be extinguished by consent as well as by payment. A discharge may be gifted or granted without full payment having been made. It is sufficient that the creditor is satisfied, and declares his will to acquit the debtor. The Romans expressed this mode of extinction by the term *acceptilatio:* with us it is understood by the word *satisfaction* (*b*). (2.) But it may be doubted whether *satisfaction*, in collocation with *payment*, would be held to import that species of satisfaction implied in acceptilation, although Ross seems to assume this effect. It would rather seem that the creditor's intention to discharge without adequate performance must be clearly stated

on the face of the instrument; and therefore, although the term *satisfaction*, employed by itself, would probably be sufficient, its use alongst with the word *payment* should be combined with a declaration that the sum received is accepted as in full; at least with a specification of the amount. (3.) When payment, whether total or partial, is the consideration and is expressed, the discharge is invalid unless payment be made (*c*). It is true, that the fact of non-payment can only be established by the debtor's writ or oath (*d*); but when such is admitted or proved by competent evidence, the discharge is null without reduction (*e*); and as it is thus no longer evidence, the subsequent payment, if averred, must be established by the debtor otherwise than by that document (*f*). (4.) Satisfaction, when clearly forming the inductive cause, wholly extinguishes the obligation as a ground of debt,—a result which does not always necessarily flow from payment; (below, 136. 4); and thus operates in favour of a cautioner or joint obligant, unless it clearly appear that the discharge applies only to what is separately due by the party discharged, or the claim, as against a co-obligant, be expressly reserved (*g*). It is on the principle of satisfaction that a private discharge on security for payment of a composition is valid to the debtor, provided it clearly appear to have been the intention of the creditor to accept vouchers for the modified sum in full satisfaction of the debt. At one period a notion seems, indeed, to have prevailed, that a transaction of this kind was of the nature of a proper contract, wherein if one party fail in performance, the other may at his option be free, and that the discharge was thus conditional on payment being made of the stipulated composition. But it is now fixed that such arrangements are to be interpreted according to the terms employed in the discharge, which, if it bear an acknowledgment of the creditor's receipt of bills, or other vouchers

of debt in security of the composition, and an absolute release of the debtor, will receive effect (*h*). A discharge under the bankrupt act has this effect by statutory force, and the composition can be recovered only by means of proceedings under the bond granted by the bankrupt and his cautioner (*i*). (5.) As the falsehood of the affirmation in this clause, that the money has been received by the creditor, can be established only by the debtor's writ or oath, the terms, "renouncing all exceptions to the contrary," which cannot exclude these modes of proof, are now mere surplusage. (See *Moveable Bond.*)

(*a*) AND NOW SEEING that D. has made payment to me of the foresaid principal sum of L. sterling and interest due thereon from the term of amounting in whole at this date to the sum of L. of which sum I hereby grant the receipt renouncing all exceptions to the contrary.

(*b*) Stair, 1. 18. 5; Ross, 1. 215.

(*c*) Glass, 12th May 1825, S. 4. 1.

(*d*) Gordon, 11th June 1833, S. 11. 696.

(*e*) Thomson, 1st Dec. 1829, S. 8. 156.

(*f*) Mags. of Nairne, 2d Feb. 1830, S. 8. 432.

(*g*) Stair, as in (*b*); Seaton, 19th Dec. 1668, M. 3547; Smith, 22d Nov. 1821, F. C., S. 1. 159, affd. W. S. 1. 315.

(*h*) Graham, 9th Dec. 1828, F. C., S. 7. 152, and auth. cited. Observed by Lord Alloway, that no implied agreement can be allowed to operate against a positive stipulation. See Horsefall, 24th Nov. 1826, S. 5. 36. Here there was no discharge.

(*i*) 2 and 3 Vict. c. 41, § 116; Bell. Com. on the Statute, 79. 179.

136. CLAUSE OF DISCHARGE (*a*).—1. *Form.*—(1.) The terms of discharge, with the names of the creditor and debtor, the description of the document of debt, the consideration received, and the testing clause, form the essential parts of the deed. For although it has for a considerable period been common to branch it out into separate clauses, the form in use in Spottiswoode's time was much more simple (*b*), and even this is greatly more complex than the

ancient *evacuatoria ;* (above, § 132.) (2.) The debtor is discharged of the sum in the bond, and the diligence (if any) following upon it,—a form commented on by Ross (*c*) and in the Juridical Styles (*d*), even as respects the mere order in which these particulars are expressed, as if it were of any importance to do more than acknowledge the creditor's receipt of a particular sum as the contents of a specified document of debt, in order to furnish the best evidence to the debtor of that essential fact. Mr Ross seems, indeed, to admit that the specification of *all action, diligence*, &c. is redundant, and serves only " to round " this period or clause," a mode of adorning the styles of deeds which it is full time to abandon for something like simplicity of expression. But where inhibition or adjudication has passed upon the bond, it is advisable to make special mention of such diligence, in order to facilitate the registration of the discharge in the proper register; because, although payment extinguishes even a real burden without express renunciation, as being merely accessory to the debt, and must therefore have the lesser effect of removing the *nexus* of real diligence, although not specially described, it is of importance to the debtor that the discharge should appear on the register.

2. *Terms.*—The word *discharge* is to be considered as the material term, although it is not to be doubted that where the contents of a bond are paid in full, a simple acknowledgment of receipt would form a sufficient defence against future action or diligence. The term *exoner* is applicable to the case of the discharge of an office, *e. g.* that of trustee or tutor. *Acquit* seems in all instances to be superfluous.

3. *Discharges general, special or mixed.*—It is of importance to the proper structure of this clause, that the conveyancer should keep in view the effect of different forms of the releasing terms with reference to the inten-

tions of the parties. (1.) *A special discharge* plainly amounts to no more than an acquittance of the particular debt or claim, whatever the number or complexity of the transactions between the parties. (2.) But a *mixed discharge, i. e.* a special, joined to a general discharge, has effects which are not manifest from the words employed. A discharge of this sort, which embraces an acquittance of certain specified debts or claims, and generally of *all debts, sums of money, bonds, obligations, clags, claims for whatsoever cause*, or words of the like purport, extinguishes the particular debts, but such other claims only as are of the like or less importance than the greatest of these particulars, "unless both" (as Stair expresses it) "be of one kind, as a greater sum "with lesser sums expressed;" or (as observed by Balfour) "gif there be na uther thing, *præter illud majus in quo* "*potest operari;*" (*e*) an exception to the rule not recognised by Stair or Erskine (*f*), yet receiving considerable support from a decision of the House of Lords in regard to the effect of a mixed clause of discharge in a contract of marriage (*g*). It is affirmed by Erskine that a discharge of a moveable debt, with a general clause subjoined, will not embrace a heritable bond with a clause of infeftment. But it may perhaps admit of question whether there be any thing in the nature of such an obligation to take it out of the exception expressed by Stair, until it has been perfected by a registered sasine; after which, as a feudalised security is in practice extinguished by a formal discharge and renunciation, the presumption would probably be against an intention to release the debtor by a mere general clause adjected to a discharge from a specified claim. Cases have occurred in regard to the effect of a general, in connection with a special clause in *mortis causa* settlements, which have been assumed to bear a close analogy to the present subject (*h*). In one instance, where the particulars followed the general description, the latter

was held to be controlled by the special enumeration, and therefore to exclude a subject which was not particularised; but there were circumstances indicative of intention (*i*). Later cases do not afford any fixed rule of interpretation, and rather seem to be adverse to that expressed by Stair and Erskine (*k*). (3.) *A general discharge* (*l*) is, in the ordinary case, unlimited in effect (*m*); and the exceptions would appear to resolve into claims which had not become prestable at the date of the discharge, and so cannot be supposed to have been in the view of either party. Such, for example, is a contingent debt, *e.g.* a claim of relief from a cautionary obligation which had not been enforced (*n*). The same principle seems to rule the case of an obligation of warrandice not yet prestable, which is in effect a cautionary undertaking (*o*). Nor does it appear to be an exception, that a general discharge does not embrace a claim already assigned to another, of which the creditor has not been divested by intimation, for the presumption is against an intention to transact in relation to a subject already conveyed away (*p*). The exclusion, in one instance, from the effect of general terms of an obligation to perform a fact, seems to have been warranted by the meaning of the words employed; for these being necessarily relative to the consideration, which was the creditor's intromission with rents, do not appear to have been intended to comprehend any but money obligations (*q*).

4. *Discharge to one obligant as affecting another.*—(1.) An unqualified discharge to an obligant liable for the whole debt, proceeding upon satisfaction, which, according to Stair, imports an acknowledgment of performance (*r*), extinguishes the obligation, since the party discharged, having paid no money to the creditor, has no claim of relief against co-obligants. The same result takes place where one of two or more co-obligants pays only his

own proper share, and obtains an absolute discharge. (2.) But a creditor may accept of a composition from one obligant, and still preserve his claim for the balance as against a cautioner or co-obligant, by means of an express qualification of the effect of the discharge (*s*). This may, in its result, be truly no absolute discharge to the party so paying the composition, since, if the creditor shall afterwards proceed against the co-obligant, the latter having his right of relief reserved, becomes thus the creditor for what he shall have advanced. A discharge under the bankrupt act being absolute, and incapable of qualification, the creditor, by consenting to the debtor's discharge without consulting the cautioner, discharges likewise the cautioner; although not by accepting a composition which has been sanctioned without his own concurrence (*t*). (3.) A cautioner, on the other hand, who pays in whole or in part, and receives an unqualified discharge, does not extinguish the obligation, which subsists for his relief, and to which, as it is now held that he has *beneficium cedendarum actionum*, and may compel the creditor to put him in his room and place, he is at any time entitled to an assignation to the effect of operating his relief (*u*). It has accordingly been for a long period the practice for the cautioner to obtain from the creditor an express assignation to the bond, in order to acquire the privilege of proceeding by summary diligence, in place of an ordinary action (*v*). (See *Discharge and Assignation.*) (4.) The same rule appears to hold in favour of an obligant who pays more than his own proportion of the debt. *Correi debendi*, bound *in solidum*, are truly cautioners mutually for one another for the excess beyond their respective shares, and have thus a proper right of relief *inter se* (*w*). (5.) Full payment, therefore, does not properly extinguish an obligation, unless the party making payment be sole obligant; but it subsists for his relief against co-obligants in reference to

the excess over his own share. (6.) A joint obligant is in a different situation from one bound *in solidum*. He is only liable *pro rata*, and if he pay more than his share, he does so not as a guarantee, but a third party, and he may obtain an assignation as a purchaser.

(*a*) THEREFORE I have exonered and discharged and do hereby EXONER ACQUIT and *simpliciter* DISCHARGE the said B. his heirs executors and successors of the said principal sum of L. . with the whole interest due thereon and of the foresaid liquidate penalty and termly failures all contained in the bond above narrated and of the said bond itself and the whole clauses obligations tenor and contents of the same with all action diligence and execution which have followed or are competent to follow thereon.

(*b*) Spottiswoode's Styles, p. 59. "I, A., GRANT me to have received "from B. full and complete payment of the principal sum of 1000 pounds "Scots money, and of the annualrents of the said principal sum due from "Whitsunday 1763 to Whitsunday 1764, contained in and due by his bond "granted to me, dated and registered in the books of Council "and Session," &c. "THEREFORE I, by these presents, exoner him and "his successors whatsoever of the foresaid principal sum and annualrents "thereof due at and preceding the date hereof, and of 200 pounds of "liquidate expenses contained in and due by the bond above specified, to-"gether with the foresaid bond itself, letters of horning raised thereon, and "executions thereof, with all that has followed or can follow thereon: "Which discharge I oblige me and my heirs whatsoever to warrant to the "said B. to be to him and his foresaids a sufficient exoneration of the pre-"mises at all hands and against all deadly. Likeas I have delivered to him "the extract of the foresaid bond, with the letters of horning raised there-"upon, to be cancelled and destroyed at pleasure."

(*c*) Ross, 1. 217-19.

(*d*) Jurid. Styles, 2. 361.

(*e*) Stair, 1. 18. 2; Balfour, *General Discharge*, c. 7.

(*f*) Stair, as in (*e*); Ersk. 3. 4. 9.

(*g*) Ewen or Grahame, 15th Jan. 1824, as reversed, W. S. 1. 595. See also S. 6. 478, W. S. 4. 346; Glover, 7th Dec. 1810, F. C.

(*h*) See Note * and (by Ivory) 236, Ersk. 706.

(*i*) Logan, 13th Dec. 1797, M. 11,379.

(*k*) See Brown, 3d Dec. 1805, M. App. *Clause*, No. 5, where there were no general descriptive terms in the leading branch of the clause. In Glover, as in (*g*), a general clause in a settlement, following an enumeration of particulars, was held to embrace heritage, although no heritable subject occurred amongst the particulars.

(*l*) THEREFORE I do hereby exoner acquit and *simpliciter* discharge the

said B. of all debts and sums of money heritable or moveable due to me by him and of all claims and demands whatever whether relating to heritage or moveables competent to me against him with the vouchers instructions and documents thereof and all action diligence and execution which have followed or are competent to follow upon the same whatever.

(*m*) Stair, 1. 18. 2; Ersk. 3. 4. 9. See Harris, 2d March 1822, S. 1. 370.

(*n*) Stair, Ersk., as in (*m*); M'Taggart, 28th Feb. 1828, as reversed, W. S. 4. 361. Here the discharge embraced "all claims and demands, "debts and sums of money indebted and owing upon any cause or account "whatever at and preceding the said date, and of all action and execution "competent for the same." The creditor, at the time of executing the discharge, took from the debtor a conveyance in security of a claim of relief from a cautionary obligation, for which he had not then been distressed. The Court nevertheless determined that the claim of relief was discharged; but, in the House of Lords, Lord Wynford held, on the general question, that the claim of relief was not a debt or claim existing at the period specified in the discharge, and did not therefore fall within the scope of the clause; and, separately, that the relative deed of conveyance was clearly expressive of an intention to exclude the prospective obligation of relief from the operation of the discharge.

(*o*) Ersk. as in (*m*).

(*p*) Ersk. as in (*m*).

(*q*) Ersk. as in (*m*); Dalgarno, 19th Nov. 1680, M. 5030.

(*r*) Stair, 1. 18. 5.

(*s*) Smith, 22d Dec. 1821, F. C., S. 1. 159, affd. W. S. 1. 315. It was held that the words, *reserving recourse against the cautioner*, implied the condition that the discharge should not be good to the debtor unless the cautioner continued bound. But the qualification ought to be expressed in such terms as the following: "And declaring, that nothing herein contained "shall be construed to effect the right of relief of the said cautioner, "against whom all claims are hereby reserved, and that this present dis-"charge shall be valid on that express condition only." See Bell, Com. 1. 359-60. The learned author lays it down, that notice to the cautioner (at least his knowledge of the transaction) is besides necessary. But if the effect of the qualification be to preserve the cautioner's right of relief, notice would seem to be superfluous, because the acceptance by the creditor of the composition is thus (as respects the rights of the cautioner) equivalent merely to his acceptance of a partial payment. If notice to the cautioner were essential to preserve his right of relief, the case would be different; but this seems nowhere to be maintained.

(*t*) See Bell, Com. 1. 359, 2. 442, 475; note (by Ivory) 173, Ersk. 682, and auth. cited.

(u) Stair, 1. 18. 2; Scrimzeour, 8th July 1675, M. 3549; Erskine, 14th Jan. 1780, M. 1386; Bell, Com. 1. 348. See Ersk. 3. 3. 68.

(v) See Dallas, p. 5; Scrimzeour, as in (u), where it seems at that early period to have been assumed as unquestionable that a cautioner had *beneficium cedendarum actionum*, although the contrary is laid down by Erskine as in (u). See below, *Discharge and Assignation.*

(w) Stair, 1. 8. 9; Ersk. 3. 3. 74; Bell, Com. 1. 346; Wallace, 25th Jan. 1717, Dalrymple, No. 167, noticed in Erskine, as in (u).

137. PARTICULAR CASES DEPENDING ON MODES OF EXPRESSING THE CLAUSE OF DISCHARGE.—(1.) The ordinary terms of a general discharge are expressed above, (p. 266,) and its effect explained, (§ 136,) and it has been seen that it does not embrace a claim of relief from a cautionary obligation which is merely contingent and may never form a ground of debt against the party. But when the debt is immediately prestable, general terms have been held to embrace it, although plainly not in the view of the parties, at the time of the settlement. Thus, where a general discharge was granted on payment of a composition at the rate of so much *per* pound, and a claim was entered that did not include a certain debt, on which accordingly no composition was drawn, the absolute terms employed were nevertheless held to extinguish this particular debt (*a*). Thus also a discharge of all debts contracted, with a clause of delivery of vouchers, has been held to reach a bill of which the term of payment has not arrived, for the debt is ascertained and not contingent, although the period of credit be still current (*b*). (2.) A discharge whether general, special or mixed, granted to the debtor in a particular character, will not cover debts due by him as an individual. Thus a release from debts described as copartnery debts will not extinguish claims competent against the debtor as a private party (*c*). (3.) The effect of a conditional discharge being dependent on the occurrence or performance of the condition, an acquittance *upon payment* of a composition or the delivery of vouchers for the composi-

tion does not operate until such payment or delivery has been made; and the claim revives in full on the second bankruptcy of the debtor. A condition of this nature is indeed implied in a composition-contract at common law (*d*); but it may be expressly excluded (*e*). In this respect a discharge under a private composition-contract differs from the statutory discharge under the sequestration acts, which is absolute of the original debt, and the words *upon payment*, erroneously used in the decrees of the Court, were interpreted to mean *except as to payment* of the composition, the intention being clear to adopt the terms of the existing statute, which were altered *per incuriam* (*f*). It is another condition implied in a composition discharge whether private or judicial, that all the creditors shall join in accepting the composition and no more; and thus a stipulation by any of the creditors made prior to the contract, for a sum greater than the composition, is reducible at common law in the one case, and by statute in the other (*g*). (4.) A discharge to the principal debtor, *reserving recourse against the cautioner*, is valid as between the debtor and creditor; but as it does not extinguish the obligation as in a question with the cautioner, neither can it exclude his recourse upon the debtor, if the creditor should enforce the claim against the cautioner (*h*). (5.) A discharge has in special circumstances been regarded as qualified by the inductive cause. Where a parent, on the ground of a desire to provide for her children by a former marriage, discharged in favour of the children, *their heirs and assignees*, an annuity to which she had right, this was not extended to heirs whomsoever of the children, but by reason of the inductive cause was restricted to heirs of their bodies (*i*). A discharge of this sort does not operate an extinction, but a mere suspension of the right. (6.) A clause annulling a discharge in a certain event is suspended by the non-implement by the other party of a relative condition (*k*).

(a) Harris, 2d March 1822, S. 1. 370. The discharge was of all debts and sums of money due prior to a specified date, "in whatever manner of "way the same may be vouched or constituted."

(b) Adam, 9th May 1831, S. 9. 570.

(c) Crawford, 28th May 1827, (affirming judgment,) W. S. 2. 569; Sharpe, 11th July 1829, S. 7. 901.

(d) Bell, Com. 2. 472, 506; Paul, 19th Dec. 1820, F. C.

(e) Graham, 9th Dec. 1828, F. C., S. 7. 152.

(f) 54 Geo. III. c. 137; Bell, Com. 2. 473; Saunders, 10th March 1827, F. C., S. 5. 565. By the recent statute, (2 and 3 Vict. c. 41,) the bankrupt is by the discharge re-invested in his estate, and the claim for the composition must be grounded on the bond by the bankrupt and his cautioner; (§ 116.)

(g) 54 Geo. III. c. 137; Bell, 2. 504; 2 and 3 Vict. c. 41, § 124. The case not unfrequently occurs of the debtor, *after* the arrangement, agreeing to pay a particular creditor or creditors in full; and it is of course quite open to him to do so, either immediately or by means of a substantive reconstitution of the debt. But a case of this sort must be entirely clear of evidence that any partial agreement took place *prior* to the composition-contract; and it will generally be viewed with suspicion, when the other creditors have received no more than the composition. See Sutherland, 14th Jan. 1830, S. 8. 313; Scoular, 18th June 1831, F. C., S. 9. 766.

(h) Smith, 22d Dec. 1821, F. C., S. 1. 159, affd. W. S. 1. 315. See § 136, note (s).

(i) Moodie, 11th Jan. 1829, S. 7. 743.

(k) Osborne, 18th May 1832, S. 10. 546.

138. CLAUSE OF WARRANDICE (a).—(1.) In a discharge which bears the essential particulars of the names of the parties,—the consideration received,—a sufficient description of the document of debt,—the terms of discharge,—and the testing clause, the clause of warrandice, as usually expressed, appears to be superfluous. An undertaking to warrant a discharge is in effect nothing more than is contained in the prior part of the deed,—a declaration that the claim is no longer competent to the creditor. The obligation being by the assumption effectually extinguished by the prior clauses, warrandice seems thus superfluous. (2.) On the other hand, if the title of the party professing to be the creditor is doubtful, the clause of warrandice ought

(where money or other consideration has been received) to engage to do something more then merely *warrant the discharge;* for it is plain that were the debtor distressed by another claimant, and obliged to resort to the obligation of warrandice, an undertaking in these terms would be wholly ineffectual to ground arrestment or poinding against the receiver of the money. It would do no more than found an ordinary action, which is plainly competent without an express clause of warrandice (*b*). (3.) A clause of warrandice to be of any effect for the purposes of summary execution, ought to contain an obligation for repayment of the debt, or such sum as has been actually received, in the event of an effectual claim being made by another party on the debtor in the obligation; and (as in the deeds of the middle ages) impose a penalty on the granter or his heirs, in the event of their challenging the validity of the discharge.

(*a*) AND I hereby bind and oblige myself my heirs executors and successors to warrant this discharge at all hands and against all mortals as law will.

(*b*) Mr Ross (1. 218.) has overlooked this difficulty.

139. CLAUSE OF DELIVERY OF THE OBLIGATION (*a*).—This clause is useful only to the creditor, as furnishing evidence in the hands of the debtor that the bond, decree or other voucher of the debt was redelivered to him. And this will accordingly be presumed on a demand by the debtor to give him possession of it. Such possession ought in all cases to be obtained by the debtor, for otherwise a claim might be advanced upon the bond, at any period within forty years, or (if minorities have intervened) even after a much longer period, which the debtor's representatives might have difficulty in resisting, were the discharge destroyed or amissing. Where the bond has been registered, delivery of an extract is all that can be given, the

debtor having the option of recording the discharge; (above, § 132. 2.)

(*a*) AND I have herewith delivered up to the said B. the said bond to be kept and used by him and his foresaids as their own proper writ and evident in all time coming.

140. CLAUSE OF REGISTRATION (*a*). — This clause is necessary if the discharge is meant to be recorded in a register of deeds, or, as it is styled, *in the books of Council and Session or others competent*, for preservation. Registration for summary diligence is inconsistent with the nature of a discharge, which is not a deed of obligation except as regards the warrandice, and a claim under the warrandice, as usually expressed, can only be liquidated by an ordinary action, after which execution proceeds by charge on the decree. Registration in the register of probative writs may be obtained of any writing bearing this character; but as the deed is not preserved in the register, registration of this sort is but little resorted to in the case of formal deeds.

(*a*) AND I consent to the registration hereof in the books of Council and Session or other competent register therein to remain for preservation and for that purpose constitute my procurators, &c.

141. TESTING CLAUSE (*a*).—This important clause is in the ordinary form. It is a question of much importance, whether a discharge not holograph must be executed with the solemnities of the statutes which regulate the authentication of writs. (1.) The general rule laid down by Erskine (*b*), that the same solemnities that are requisite to a deed which creates an obligation, are necessary in a written discharge of it, according to the rule, *unumquodque eodem modo dissolvitur quo colligatur*, disposes of only a limited portion of the cases occurring in daily practice. It has been applied to the discharge of a legacy (*c*), and

plainly regulates the cases of bonds, contracts and other formal writings; but discharges to tenants for their rents, although due under formal leases, as well as receipts *in re mercatoria*, have long formed exceptions to the rule (*d*); as have likewise receipts following upon precepts issuing from Exchequer, although for sums whereof the payment cannot be established by parole testimony (*e*). (2.) By inveterate practice, also, receipts in the ordinary course of business, for interest, annuities, feu-duties, and generally for all moneys not being principal sums contained in bonds, contracts or the like, are valid without being holograph or attested. It is probable that the insertion of all such payments in the account-books of men of business and merchants was the cause of the practice in this respect; but whatever its origin, it has been regarded as now too general to be doubted as forming law. Even as respects a discharge for a composition agreed to by creditors, the objection on the statute of 1681 has been overruled (*f*). (3.) The result seems therefore to be, that all money claims not constituted by formal writings may effectually be discharged by means of simple receipts neither holograph nor tested (*g*); and that discharges are strictly applicable only to sums contained in deeds, obligations *ad factum præstandum*, the responsibilities of an office such as factory or trusteeship, and the like. The word discharge as here used, (except as regards those obligations and responsibilities which are not strictly pecuniary,) imports not, however, a regular and formal deed of discharge, containing all the clauses which have now been considered, but a document, whether styled a discharge or receipt, holograph or attested according to the statutes; a valid writ probative of the receipt of the sums expressed in it, and sufficiently descriptive of the parties and the debt, being all that the law requires. As regards those receipts not holograph of the granter, which fall within the exception

above expressed, they are not of themselves probative (*h*); the subscription when denied by the party, or disowned by representatives, must be established by competent evidence. It is therefore a good practical rule to demand a holograph receipt, when the party paying the money has no opportunity of satisfying himself that its payment is duly entered in regular account books.

(*a*) IN WITNESS whereof I have subscribed these presents written on this and the preceding pages of stamped paper by C. clerk to D. writer to the signet at Edinburgh the day of 1840 years before these witnesses E. and F. both clerks to the said D.

(*b*) Ersk. 3. 4. 9.

(*c*) Grierson, 4th July 1781, M. 17,054.

(*d*) Stair, 1. 18. 2; Ersk. 3. 2. 23-4.

(*e*) E. Melvil, 28th Dec. 1693, B. S. 4. 171.

(*f*) Campbell, 30th May 1822, S. 1. 446. The report bears that the objection was stated; but it does not appear to have been alluded to by the Lord Ordinary or the Court. Glass, 12th May 1825, S. 4. 1. The Lord Ordinary (Meadowbank) repelled the objection on the ground of the universal practice; and although the case turned chiefly on another point, the Court appear to have unanimously concurred in this view. See Bell, Com. 2. 504; Jurid. Styles, 2. 424, *et seq.*

(*g*) (*Form of receipt.*)—Edinburgh, 15th May 1840. Received by me writer to the signet from C. writer to the signet agent for and on account of E. Esquire of , the sum of L.50 sterling being a half-year's interest due at the present term of Whitsunday on bond and disposition in security dated the day of by the said E. to G. Esquire of and which interest is hereby discharged by me (as *factor, mandatary or agent*) for the said G.

(*h*) See Glass, as in (*f*).

142. PRACTICAL RESULTS.—1. *Expense of the discharge.*—(1.) The debtor may, as a matter of course at his own expense, demand a regular and formal discharge, containing the full complement of clauses, which a creditor receiving his money has no interest to refuse. (2.) But he can require, at the expense of the creditor, (unless the contrary has been stipulated,) such a discharge

only as is essential for proving the fact of payment, and placing him in the same situation in respect to such proof as the creditor maintains in relation to the evidence of the debt. Where, therefore, the bond or other document of debt (excepting always bills and promissory-notes, which are never formally discharged, but merely redelivered) is in the power of the creditor, so as to be given up to the debtor, the latter is plainly entitled to no more than what affords legal evidence of his having obtained redelivery of the obligation upon payment; and this is sufficiently shown by his possession of the obligation, with a receipt indorsed on it, and a separate acknowledgment bearing a receipt stamp in order to exclude objection under the stamp laws. Where, again, a bond or contract has been registered by the creditor for his own purposes, and not in consequence of the refusal or delay of the debtor to repay the money, the debtor will not be placed on an equal footing with the creditor by receiving a receipt for the money: he seems to have full right to a regular and formal deed of discharge, (which includes a clause of registration,) in order that the evidence of payment may enter the same register and be protected by the same mode of preservation with the obligation itself. On the same principle, the debtor ought in these circumstances to be repaid the fees of registration. (3.) This principle applies also to discharges to trustees, tutors, and the like, of whose actings it generally happens that evidence exists which cannot be completely given up or destroyed. (4.) But where the registration of a bond, contract, or the like, has been caused by the delay or refusal of the debtor to implement his obligation, it seems to be a fair result that he shall himself pay all the expense, (beyond that of a duly attested receipt,) necessary in the preparation of such a formal and regular discharge as he may deem essential for his safety.

2. *Terms of the discharge.*—(1.) In preparing a general discharge, it is to be kept in mind that the terms in ordinary use will not reach a contingent or conditional debt; (above, § 136. 3.) (2.) A mixed discharge, that is, a discharge of particulars, followed by a general clause, ought to contain among the particulars every claim of equal importance with any of those intended to be discharged by the general clause; (above, § 136. 3.) (3.) A discharge to a principal debtor on payment of a composition will contain a reservation of recourse against cautioners or co-obligants, if the discharge is not meant to be absolute; (above, § 136. 4.)

3. *Redelivery of the obligation.*—The creditor ought in all cases to introduce into the discharge a formal clause of delivery; and, on the other hand, it is the business of the debtor to take care that the document of debt, with all diligence following upon it, be delivered up.

4. *Evidence of payment or extinction.*—The question, in what cases a simple unattested receipt is sufficient proof of payment, is not to be mixed up with that relating to the kind of document which the debtor has a title to demand at the creditor's cost. This latter question involves a matter of expense,—that of a deed stamp and the registration of the discharge, with reference to the security of the debtor in the mode of preserving the evidence of payment; whereas the former is a question of evidence alone. According to the rule above explained, (§ 141,) a discharge or receipt, holograph or attested, is necessary evidence of the extinction of claims constituted by formal documents. On the other hand, open accounts, interest, rents, feu-duties, and the like, are in practice paid upon simple receipts, which are seldom either holograph or attested, and these are valid, *provided the subscription be not disputed;* but they are not probative *per se*. It is, accordingly, a prudential question, whether to accept of a

receipt of this nature, trusting that the payment will be duly entered in account books, or to demand a holograph document, which each individual must decide for himself on his knowledge of those with whom he transacts.

## TITLE II. DISCHARGE AND ASSIGNATION.

143. INTRODUCTORY REMARKS.—This highly artificial deed is framed mainly on principles of law which favour the claims of cautioners against the principal debtors for whom they are bound, and against co-cautioners whose shares of the obligation they have advanced. By the civil law, a cautioner paying the debt had *actio mandati*, and in order to this he might demand an assignment of the debt; but it is affirmed by Erskine, that this privilege was not at once adopted in our law, for the reason that the right of relief being competent to a cautioner or joint obligant without a conveyance by the creditor, an assignation was thus superfluous, excepting for the purpose of summary diligence (*a*). But it would appear to have been by no means fixed that the *beneficium cessionis* was denied to the cautioner at the period referred to by Erskine. It is true that in some instances it was held, or assumed apparently without much argument, that the creditor could not be compelled to assign (*b*); but in others the contrary appears to have been determined (*c*); and indeed, as observed by a learned reporter, our law on this point was long unascertained (*d*). But it is now settled that the cautioner or co-obligant may enforce an assignation by means of the remedy of suspension, in which process the diligence will be stayed until the creditor shall vest the cautioner, by assignation, with all right belonging to himself, and every collateral security which he holds appropriated to this particular engagement (*e*). A cautioner

for payment of rent, or the interest of a heritable bond, has the same privilege (*f*).

(*a*) Ersk. 3. 3. 68.

(*b*) Hume, 10th July 1666, M. 2112, 3347; Wood, 12th Dec. 1695, M. 3355; Wait, 31st Dec. 1697, M. 3356.

(*c*) Leslie, 10th Jan. 1665, M. 2111; Scrimgeour, 8th July 1675, M. 3549, (Stair's Report.) The distinction between this and the other cases cited by Erskine, as in (*a*), followed by Ross, (1. 223,) does not seem to maintain; for the Court held the creditor to be bound to assign not merely the separate security, but likewise the bond itself. See also Dallas, 1. 10.

(*d*) Lord Fountainhall in Wood as in (*b*).

(*e*) Ross, 1. 223; Bell, Com. 1. 348; Leslie, as in (*c*); Erskine, 14th Jan. 1780, M. 1386, and auth. cited.

(*f*) Stewart, 31st May 1814, F. C.; Lowe, 17th Feb. 1825, S. 3. 543.

144. CLAUSES.—The discharge and assignation being a combination of these two forms of conveyance necessarily partakes of the clauses of both; the clause of assignation coming in between the clauses of discharge and warrandice. The warrandice is absolute of the discharge, and only from fact and deed as regards the assignation. A form of the deed is exemplified below (*a*).

(*a*) I A. CONSIDERING that B. and C. by their bond dated the day of bound and obliged themselves (*obligation in the bond narrated*) as the said bond registered in the books of Council and Session upon the day of more fully bears and also CONSIDERING that the said B. by bond of relief granted by him to the said C. dated the day of acknowledged that he was only cautioner in the foresaid bond the said principal sum having been wholly applied to the said B.'s use and behoof and he thereby obliged himself to relieve the said C. thereof and of all consequences of his obligation as the said bond of relief more fully bears AND NOW SEEING that the said C. has made payment to me of the foresaid principal sum and interest due thereon since the day of all former interest having been paid with the sum L. of expenses of recording and of diligence thereon amounting in whole at the date hereof to the sum of L. THEREFORE I discharge the said C. of the said several sums of money and of his obligation contained in the said bond itself with all following or competent to

follow thereon BUT ALSO in order that he may operate what relief is competent to him against the said B. I hereby ASSIGN to the said C. his heirs and donatars the said several sums of principal interest and expenses amounting to the said sum of L. and the said bond itself interest to become due thereon and penalty if incurred and all following or competent to follow thereon BUT SECLUDING diligence or action in my name against the the said B. WHICH discharge and assignation I oblige myself my heirs executors and successors to warrant as follows viz. the discharge at all hands and against all deadly and the assignation from facts and deeds only And I have herewith delivered up to the said C. an extract of the said bond and whole diligence following thereon AND I consent to the registration hereof in the books of Council and Session or others competent for preservation and for that effect constitute my procurators &c. IN WITNESS WHEREOF these presents written on this and the preceding page of stamped paper by D. clerk to F. writer in Glasgow are subscribed by me at Glasgow the day of before these witnesses H. and K. both also clerks to the said F.

145. EFFECT.—(1.) The assignation is not strictly limited in effect to the privilege of personal diligence on the obligation assigned: it seems to confer on one of several debtors bound *in solidum* higher powers as against co-obligants than he possesses at common law. As assignee in right of the principal debtor, a cautioner or other obligant appears to have the weight of authority in support of his claim, in the first instance at least, to reimbursement of the whole debt from any one solvent co-obligant, deducting only his own share, and a proportion of the shares of the co-obligants who have become notoriously insolvent, leaving such solvent co-obligant to seek his relief as he best may (*a*). Mr Ross explains the advantage to be derived from the privilege thus acquired, by supposing the case of several co-obligants who are all at the time solvent, but some of whom, by the operation of this very claim, might be rendered bankrupt; so that the assignee, by obtaining payment from an unquestionably sufficient party, avoids the risk of that consequence (*b*). (2.) It may be doubted, perhaps, whether, in ultimate effect,

a privilege of this nature is of any real advantage to the assignee. At common law solvent parties must divide equally the loss (*c*); and thus an obligant who pays in the first instance deducts, in settling with the solvent co-obligant, (if there be only one, and an assignation thus of importance only for summary diligence,) an equal proportion of the shares of the insolvents. But an assignation from the creditor to one of several solvent co-obligants could not permanently alter a rule of accounting founded on the rights belonging to co-obligants in questions with one another, unless it were held that a party who has no interest beyond receiving payment of his debt, had nevertheless the power, by means of the form of the conveyance, of affecting the mutual interests of others. If the strict rule of law, therefore, appear to favour an obligant who pays the debt and obtains an assignation, in recovering, in the first instance, from any one of several solvent co-obligants the entire balance of the debt, under deduction only of the proper share of the assignee and his proportion of the shares of insolvent co-obligants, it is plain that the party who repays to the first may have recourse against him for a proportion of such loss as shall happen through the future insolvency of any of the other co-obligants. And thus the mode of accounting laid down by Kames, and adopted by Bell, is even in the first instance the more equitable, viz. that an obligant paying the debt may, after deducting his own share, recover from a solvent co-obligant (not the whole balance, as above supposed, but) merely the share of the latter, and the one-half of the remainder of the debt, each having right and being bound himself to seek relief from co-obligants, whether solvent or insolvent, of their proportions of what he has advanced over and above his own proper share of the debt (*d*). In this manner an after reckoning is avoided.

(*a*) Bank. 1. 163; Ersk. 3. 3. 74; Kincaid, 7th Feb. 1665, M. 2118; Smeiton, March 1684, M. 14,641; Ross, 1. 225, *et seq.*: contrary to the opinion of Kames, Pr. of Equity, 14, *et seq.*

(*b*) Ross, as in (*a*).

(*c*) Muir, 2d Feb. 1662, M. 14,654; Lamberton *v.* E. of Annandale, Feb. 1683, M. 14,655; Cleghorn, 26th Dec. 1707, M. 14,624.

(*d*) Kames, as in (*a*); Bell, Com. 1. 355. See Finlayson, 20th Dec. 1827, S. 6. 264.

# CHAPTER VI.

## MISCELLANEOUS DEEDS.

### TITLE I. THE INDENTURE.

146. ORIGIN.—The term indenture is borrowed from the practice of England, where it is employed to denote that class of deeds, or at least a large portion of them, which with us are denominated contracts. It does not appear from our style books that this deed was at any period written, as its name imports, on a single sheet in such a form as that the obligations of the parties were kept separate, and (the two portions being afterwards cut asunder) indentations left, which proved the genuineness of the deed. Although the name of the deed was thus adopted from a term of English conveyancing, that of the principal party, *apprentice*, is derived from the French word *apprenti;* but as the same term is employed in England, it is probable that both the name and the deed were immediately imported from the sister country. This contract is applicable to the engagement of young persons learning a profession or trade, who are necessarily taken bound for a considerable period, and may be said to labour for the purpose of instruction, by the year, in place of by the day for wages, as do more expert workmen, who (from the French term *journalier*) are with us called journeymen. A written agreement is rendered necessary, irrespective of special stipulations, by the length of the period to which it relates, for a verbal contract of service for more than one year is not binding in law (*a*).

(*a*) Caddel, 3d June 1749, M. 12,416.

147. GENERAL NATURE.—(1.) The indenture is a mutual obligation or contract *ad factum præstandum*. It may be described as an agreement on the part of the master to instruct the apprentice in a profession or trade, in consideration of a certain premium or apprentice-fee; and therefore it may be assumed that, at least for the first portion of the term of apprenticeship, remuneration, in a direct pecuniary form, is the chief object on the part of the master, and instruction on the part of the apprentice and his relations. (2.) The apprentice engages with the consent of his father or other legal guardian, or if he have none, of some kinsman, who evidences such consent by joining as a party to the deed; and no action lies against the apprentice (if a pupil) at common law for implement of the indenture (*a*). But a minor after pupillarity, who is without curators, may validly enter into indentures: still, whether bound singly, or with the consent and concurrence of curators, he has the ordinary privilege competent to minors of being restored on the head of minority and lesion against unsuitable or irrational stipulations (*b*). (3.) Although the consent of a curator who has not subscribed the indenture may be inferred from subsequent acts (*c*), it is plainly the duty of the conveyancer to provide against difficult legal questions by introducing the proper guardian of the minor, when he has any such, as a party to the deed. (4.) This deed, as a mutual contract and bilateral obligation, is perfected by the subscription of the parties, being incapable of delivery like a unilateral deed (*d*).

(*a*) Ersk. 1. 7. 62.
(*b*) Ersk. as in (*a*).
(*c*) See Harvey, 7th March 1829, S. 7. 561.
(*d*) Ersk. 3. 2. 44.

148. CLAUSES OF THE DEED.—The indenture, in its ordinary form, contains these clauses, viz. 1. *Introductory*

*clause.* 2. *Obligations on the apprentice.* 3. *Obligation on the cautioner.* 4. *Obligations on the master.* 5. *Penalty.* 6. *Clause of registration.* 7. *Testing clause.*

149. INTRODUCTORY CLAUSE (*a*).—In this part of the deed are expressed the names and designations of the parties, and of the guardian or kinsman who engages with the minor, as cautioner for the performance of his part of the contract. This engagement must be expressed in such terms as those contained in the third clause of the deed, (below, 151): the words, *taking burden for* the apprentice, do not import any specific obligations on a guardian who does not also bind his heirs, and thus show his intention to undertake personal and pecuniary liability, unless followed by a substantive undertaking (*b*).

(*a*) IT IS CONTRACTED AGREED AND ENDED between A. upon the one part and B. with the special advice and consent of C. and the said C. for himself and as cautioner and otherwise bound in manner under written upon the other part in manner following:

(*b*) Gray, 2d Dec. 1724, M. 2270. The son became bound, "with the "special advice and consent of his said father, and the said Thomas White, "elder, for himself, and taking burden on him for his said son, and they "both, with one consent and assent." The father was held not to be bound as a cautioner. Keir, 14th Nov. 1679, B. S. 3. 435. The report bears, that "The Lords found the father liable (notwithstanding of those words, *in re-* "*spect of his minority*) as *expromissor* or *correus debendi*, since he, his heirs "and executors, were bound." These cases related to an obligation in a son's marriage-contract.

150. OBLIGATIONS ON APPRENTICE (*a*).—1. *Express obligations.*—(1.) The obligation of the apprentice being undertaken with reference not merely to a particular profession, but to one individual, so that there is *dilectus personæ*, is not transferable, in any circumstances, at the sole will of the master (*b*), and it dissolves on the death of either party (*c*). But the contract is not affected by the master's change of residence, unless, indeed, the advan-

tages contemplated on the part of the apprentice, as a consequence of his becoming a member of a particular trade having certain local corporate privileges, would thereby be compromised (*d*). Where a change would be merely inconvenient, it is necessary, therefore, to stipulate that the apprentice shall not be bound to follow his master from his original place of business. (2.) The master is entitled to the services of the apprentice during the usual hours of business, and on urgent occasions at extra hours, although not to the injury of his health; but the terms, *holiday as well as week day*, contained in some indentures, do not import an obligation contrary to public law, which prohibits ordinary labour on Sundays; and consequently the master cannot exact the services of his apprentice on the Sabbath, excepting in works of necessity and mercy (*e*). Among these is not comprehended the operation of promiscuous shaving in a barber's shop on the morning of Sunday; and therefore, as such labour is unlawful in itself, a barber's apprentice, although bound in the terms above expressed, cannot be compelled to perform it (*f*).

2. *Mode of enforcing the obligation.*—The question, what remedies belong to the master against the continued desertion of his apprentice, depends, in no inconsiderable degree, on the mode in which the indenture is expressed. (1.) In relation to ordinary servants, the consequences of whose desertion are of such a nature as not to be readily estimable in pecuniary damages, the question is regarded as one of ordinary police; and it is held, that the practice in the Sheriff and Justice of Peace courts, of issuing summary warrants for the apprehension of refractory workmen, in order to compel them, by the fear of imprisonment, to find caution to return to their service, and perform their contract, is well founded, both at common law and on the statute (*g*); and the principle has been extended to engagements by indenture, in those cases, at least, where caution

has not originally been interponed (*h*). (2.) But, in another case, an opinion had been expressed of the illegality of similar warrants against apprentices, for enforcing caution that they should not only return to their service, and continue therein, but fulfil generally the engagement contracted by the indenture (*i*); and although nothing more seems to be implied in the former expression, the distinction has since been sanctioned, on the principle that such warrants are *stricti juri* (*k*). (3.) It has been doubted, in regard to an apprentice bound by a formal indenture, containing a penalty and a clause of registration for personal diligence, and to which a cautioner has become a party on behalf of the apprentice for the due fulfilment of the contract, whether a form of procedure more summary than the mode thus agreed upon for enforcing the stipulations of the indenture, be competent for compelling the apprentice to return to and continue in his master's service (*l*).

3. *Dismissal and damages.*—(1.) The power of *dismissal* in the master does not extend to slight breaches of the obligation of faithful service; although for these he may inflict chastisement, if not intemperate and excessive (*m*); and in an old case it was held to be a sufficient answer to a claim of damages, that an apprentice, who had deserted his service, was offered back by his cautioner within two or three days, a decision to which the present practice is understood to be conformable (*n*). But the obligation of honest service is infringed by acts of theft, although committed not against the master, but a third person; and as the master may, in such circumstances, refuse to receive back the guilty party (*o*), he is of consequence entitled to discharge him if still in his service. (2.) The obligation to indemnify the master for loss and damage is more generally contained in indentures between merchants and their apprentices, than in similar engagements in the trades of craftsmen; and it has been enforced by the Court as

a substantive undertaking, not limited by the amount of the proper penalty expressed in another clause (*p*). (3.) Damages on account of desertion are due at common law, and may be recovered by ordinary action.

4. *Implied obligations.*—(1.) It follows, from the nature of the engagement, that the apprentice has no longer the disposal of his own person to the injury of his master's business. Although he may marry without incurring the penalty in the indenture, provided he be willing to serve out his time (*q*), he is deprived of the power of entering into indentures with another (*r*), or giving a legal consent to enlistment in the army or navy, and he may consequently be reclaimed from either service. But this right at common law has been restricted, as regards the army, to the cases of apprentices bound for four full years, and under the age of twenty-one, and it must be exercised in a form pointed out by the statute (*s*). (2.) An apprentice, as part of his master's establishment, must, after he has received sufficient instruction for that purpose, assist in carrying on the business, by teaching a younger apprentice in that branch of trade to which he himself has been brought up (*t*).

5. *Discharge of the apprentice's obligations.*—The obligations of both parties expire of course with the natural termination of the contract, except when penal consequences remain through breach of the indenture. But the engagement of the apprentice may terminate by consent of the master, express or implied. Discharge has been held to be implied by the master knowingly allowing the apprentice to serve for a series of years with another (*u*); or failing to claim under the indenture for a long period (*v*).

(*a*) THAT IS TO SAY the said B. with advice and consent foresaid hereby binds himself apprentice to the said A. in his art and craft of and that for the space of years next from and after the date of these presents and the said B. binds and obliges himself that he shall during the

said space be a faithful and obedient apprentice to his said master and that he shall not reveal his master's secrets nor conceal his skaith but shall acquaint him therewith and prevent the same to the utmost of his power and that he shall not absent himself from his service without leave obtained from his said master and that if he fails in punctual attendance he shall serve two days after the expiration of the term herein specified (in the same station in which he serves while it lasts) for each day's absence during that time.

(*b*) Edinburgh Glasshouse Co. 22d Dec. 1789, M. 597.

(*c*) Neill, July 1760, B. S. 5. 877.

(*d*) Lauder, 7th Dec. 1687, B. S. 3. 659.

(*e*) 1579, c. 70; 1661, c. 18; Confession of Faith (c. 21, § 8,) as sanctioned by 1690, c. 5.

(*f*) Innes *v.* Philips, 19th May 1835, F. C., S. 13. 778, as reversed, 20th Feb. 1837, S. and M'L. 2. 465. The judgments and opinions in this case are very instructive. The circumstances occurred in Dundee, where, as being an extensive trading and manufacturing community, they were peculiarly favourable to the claim of the master, had such considerations been legitimate. The apprentice was merely required to work by shaving his master's customers before the hour of ten in the morning, and it was a leading argument that such labour was a less evil than that which would probably arise from the discontinuance of a custom necessary for the decent appearance of labouring persons at church. The views of the Lord Ordinary, (Jeffrey,) approved of by the Lord Justice-Clerk, (Boyle,) and sanctioned in the House of Lords under the direction of Lord Chancellor Cottenham, and Lords Wynford and Brougham, are expressed in the following note: "This is the first instance, so far as the Lord Ordinary is aware, "in which a court of law has directly and positively *ordained* a handicrafts-"man (without any pretence of necessity or serious urgency) to work at "his handicraft on a Sunday; and he certainly is in no way anxious to "establish such a precedent.

"The cases of apothecaries' shops, Sunday travelling, and others that "were cited, are evidently quite inapplicable. These exceptions have been "admitted (with more or less scruple and reluctance) on the ground that "they may frequently be requisite for purposes of *necessity* and *mercy*, and "that it would be impracticable to investigate cases of occasional abuse. "But it is ridiculous to speak of a public shaving-shop as an establishment "of such necessity as not to admit of interruption for a single day in the "week. If the advocator had refused to shave the head of a lunatic, or "one whose skull had been fractured, the cases would have been parallel. "The pretence of usage, especially such a partial usage as is alleged, is "irrelevant in a question of illegality by violation of a public law.

"That, and the mitigated nature of the offence, may account for the "connivance of the civil and ecclesiastical authorities, and may raise a "doubt as to the wisdom of proceedings for interdict and penalties. But "it is impossible to connive when these authorities *enjoin* what they may "have blamelessly *permitted*, and actually subject a man to penalties for not "doing what the law has forbidden.

"As to the alleged contract of the parties, it was admitted by the re-"spondent at the bar, that if what was required was *illegal*, the contract "must go for nothing. The words are ambiguous, and the whole argu-"ment of the respondent imported that his sense of them could not be "maintained. If *holidays* meant *Sundays*, (which is his construction,) then "the contract must have meant that the apprentice should serve on Sundays "*exactly* as he did on week days, and that there should be no distinction "between them. Yet he admits that he could not require him to work, "even at shaving, during divine service, nor at wigmaking even on the "Sunday morning. If he says he should only work when consistent with "law and decency, then the Lord Ordinary is of opinion that he should "not work at all on that day." See, on the other hand, the opinions of Lords Glenlee, Meadowbank and Medwyn, in favour of the master.

(*g*) 4 Geo. IV. c. 34; Reid *v.* Raeburn, 4th June 1824, F. C., S. 3. 104; M'Lellan *v.* Gentle, 9th July 1825, F. C., S. 4. 163.

(*h*) Stewart, 21st June 1832, and 21st May 1833, F. C., S. 10. 674, and 11. 628.

(*i*) Wright *v.* M'Gregor, 9th Feb. 1826, F. C., S.

(*k*) Stewart, as in (*h*).

(*l*) Bookless, 20th Nov. 1832, F. C., S. 11. 50. The question arose in a bill of suspension of the warrant, and the Court were equally divided. In consequence of the opinions of Lord President Hope and Lord Gillies against the validity of the procedure by summary petition, the master consented to liberation, and the bill passed of consent.

(*m*) Lessels, 13th Feb. 1680, B. S. 3. 337; Smart, 18th Dec. 1794, Bar. Hume, p. 18. Here undue chastisement in circumstances by no means creditable to the apprentice, was held to liberate him from his engagement.

(*n*) Malvenius, 17th Dec. 1686, M. 583.

(*o*) Maxwell, 8th March 1766, M. App. *Apprentice*, No. 1.

(*p*) Forbes, 2d July 1708, B. S. 4. 708.

(*q*) Fenton, 10th June 1742, Elch. *Apprentice*, 3.

(*r*) Watson, 16th Nov. 1826, S. 5. 3.

(*s*) Arbuthnot, 19th Jan. 1694, B. S. 4. 127; Wrights, 29th June 1758, M. 588; Cuningham, 19th Jan. 1796, M. 600; 2 and 3 Vict. c. 5, § 40-3. By this (the Mutiny Act) any apprentice enlisting in her Majesty or the East India Company's service, who shall state to the magistrate that

he is not an apprentice, shall be deemed guilty of obtaining money under false pretences, and shall, after the expiration of his apprenticeship, be liable to serve, and (if he do not deliver himself up) may then be taken as a deserter. By § 41, 42, the forms of the certificate by a justice of the peace to be indorsed on the indenture, and of reclaiming the apprentice, are pointed out. See as to apprenticeship to sea-service, and protection against enlistment and impressment for the navy, 35 Geo. III. c. 9; 4 Geo. IV. c. 25; 5 and 6 Will. IV. c. 19; Chalmers, 28th July 1778, M. 594; Turnbull, 26th June 1793, M. 599; Smith, 23d June 1814, F. C.

(*t*) Ballantyne and Co. 21st Nov. 1811, F. C.

(*u*) Robinson, 19th June 1800, Bar. Hume, p. 20.

(*v*) Ferguson, 15th June 1815, Bar. Hume, p. 21.

151. OBLIGATIONS ON THE CAUTIONER (*a*).—(1.) This clause ought to be expressed in such terms as clearly to exclude the benefit of discussion; for although it may reasonably be doubted whether this privilege belong to the cautioner for an apprentice, who in the general case can have no means of his own to be affected by diligence, the point has not been decided (*b*). (2.) The engagement thus come under by the apprentice and his cautioner may extend to more than the amount of the proper penalty expressed in a future clause, which, unless stipulated as pactional damages, is not a measure of pecuniary loss, but a form of liquidating a claim by either party for damages, costs of diligence, and other necessary law expenses to the extent of the penalty. (3.) An apprentice charged on a registered indenture to perform his engagement may discuss relevant objections in a suspension, without finding additional caution (*c*). (4.) The clause contains an obligation of relief by the apprentice in favour of his cautioner. (5.) And it is not unusual for the relation, who engages as cautioner, to undertake to supply the apprentice with the necessary implements of his trade during the period of his engagement.

(*a*) AND the said C. hereby binds and obliges himself his heirs executors and successors conjunctly and severally with the said apprentice for his

lawful and obedient service during the space and in the terms foresaid and for his fulfilling the whole obligations under the indenture And the said apprentice binds and obliges himself to relieve his said cautioner of all the pecuniary consequences of his said obligation And the said C. farther binds and obliges himself and his foresaids to furnish the said B. with work-tools and with body-clothes and washing during the whole space of his apprenticeship.

(*b*) See Forbes, 12th July 1708, B. S. 4. 708.

(*c*) Munro, 7th July 1837, D. 15. 1262.

152. OBLIGATIONS ON THE MASTER (*a*).—1. *General purport.*—(1.) This clause expresses the obligation on the master, which is to teach and instruct the apprentice during the period of the indenture, in as far as the master is acquainted with the trade or profession stipulated to be taught, and the apprentice is, on his part, capable of instruction, and to conceal no part of it from him,—an obligation which necessarily implies that the master shall himself be qualified, not only by expertness, but also by law, to carry on the business which he professes (*b*). This is plainly an engagement which leaves much discretionary power in the hands of the more influential party. Nor is it practicable to express, in the form of a deed, those particulars which, in any supposable line of business, it is incumbent on the master to impart to his apprentice. (2.) It is thus more emphatically the duty of the former to act with good faith towards the latter, in reference to the instruction essential to his due advancement; but it is not required that the master should, on all occasions, personally superintend that instruction, provided the business, during his absence, be carried on by competent journeymen (*c*). (3.) The instruction must be in the profession or trade expressed in the indenture, and none other (*d*), and that for the entire period agreed upon, under the penalty of forfeiting a proportional part of the apprentice-fee (*e*). (4.) The master's treatment of the apprentice must not be harsh or cruel, although moderate personal

chastisement is permitted; and if he reside with the master, his food and personal comfort must be adequate. Nor can the apprentice be compelled to perform menial or other work unconnected with his trade, unless specially stipulated (*f*). (5.) His hours of labour are regulated by the custom of the trade when express statute does not interfere (*g*).

2. *Apprentice-fee, or consideration of the obligation.* —(1.) This part of the indenture expresses, as the consideration of the master's engagement, the amount of the premium or apprentice-fee, whereof the receipt is accordingly acknowledged; such acknowledgment being in law conclusive evidence of the fact of the money having been paid until disproved by writ or oath. (2.) It is provided by statute that the full amount of the money received, or in anywise directly or indirectly given with the apprentice, shall (in order to regulate the stamp-duty of the indenture, which is chargeable *ad valorem* of the apprentice-fee,) be expressed in the indenture, under the sanction of nullity; and action lies in the Court of Exchequer for recovery of the double of any sum which has been received without being so expressed, in name of penalty. It is of importance to observe, that, as a consequence of this regulation, a completed indenture, which does not express the true consideration, cannot be stamped (*h*). (3.) The apprentice-fee being a forehand payment, which is discharged in the indenture, cannot be demanded back in whole or in part when the master or his representatives, in the event of his death, are ready to perform his part of the contract, or when the engagement comes to an end through no fault on the part of the master, *e.g.* by the death of the apprentice (*i*). But a master giving up business is liable in repayment of a part of the fee, proportioned to the period of the indenture still to run (*k*),—a rule which applies likewise to the case of the death or bankruptcy of

the master when provision is not made for the continued prosecution of the business (*l*). (4.) When indentures are contracted in order to admission into a privileged body, and a fee paid to the master and the society or corporation with reference to the expected privileges, it is understood in practice that, on the death of the individual member who became a party to the contract, such body are bound to transfer the apprentice to another member; and it is probable that an offer of such transfer or turnover would bar an action at the instance of the apprentice for repetition of any part of the fees paid at the time of entering into the indenture.

(*a*) FOR WHICH CAUSES and in consideration of the sum of L. sterling paid by the said C. in name of apprentice-fee with the said B. whereof the said A. acknowledges the receipt the said A. binds and obliges himself to teach and instruct his said apprentice in his art and craft of in so far as he knows and practises the same himself and that he shall not conceal from him any part thereof but shall do his utmost diligence to cause him learn the same in so far as he is capable and also to furnish the said B. with sufficient meat drink and bedding. (*Here are inserted particular stipulations with reference to the craft to which the master belongs.* See Jurid. Styles, 2. 160.)

(*b*) Watson, 16th Nov. 1826, S. 5. 3.

(*c*) Gardner, 13th July 1775, M. 593.

(*d*) Symonton, 14th Jan. 1673, B. S. 2. 166; Peter, 26th Sept. 1818, Mur. 2. 28.

(*e*) Dickson, 1st March 1682, B. S. 3. 427.

(*f*) Lessels, 13th Feb. 1680, B. S. 3. 337; Smart, 18th Dec. 1794, Bar. Hume, 18; Munro, 7th July 1837, D. 15. 1262; Peter, as in (*d*).

(*g*) See as to apprentices in cotton factories and cotton mills, 1 and 2 Will. IV. c. 19.

(*h*) 8 Anne, c. 9, § 33-5; 9 Anne, c. 21; 44 Geo. III. c. 98, § 24. There is here no exception of indentures, from deeds which may be stamped after execution; but at the same time, the provision in the statutes of Anne for inserting the apprentice-fee in the indenture is not repealed. 55 Geo. III. c. 184, and Schedule of Duties, p. 58. *et seq.* See as to effect of act of indemnity then in force, Sheppard, 19th Nov. 1760, M. 589.

(*i*) Sheppard, 19th Nov. 1760, M. 589.

(*k*) Dickson, as in (*e*).

(*l*) Ogilvy, Feb. 1683, B. S 2. 34, and case of Fairey referred to; Cutler, 16th Feb. 1711, M. 583, B. S. 5. 70.

153. PENALTY (*a*).—1. *Nature of the stipulation.*—(1.) The penalty in the contract of indenture is mutual on the master and apprentice. It is not in the ordinary case a sum modified in name of pactional damages for a breach of the agreement, (as in leases,) in order to save the expense of litigation, but a proper *liquidate penalty*, like other penal sums which practice has introduced into bonds and contracts, for the sole purpose of liquidating the damages and expenses to the effect of validating a summary charge for these on the decree of registration, and which is subject to restriction at the discretion of the Court, to the loss and expenses actually sustained by the party (*b*); (above, § 10. 5.) It is of importance, therefore, to keep in view that the penalty, although liquidating an amount of costs or damages not exceeding the sum expressed, cannot cover more. The clause, as usually conceived, is thus limited in effect to this specific purpose; and without a separate and substantive engagement by a cautioner, as above exemplified, for general loss and damage, (§ 151.) the master will be excluded from demanding from the cautioner more than the amount of the penalty, although he may recover at common law as against the apprentice, whatever loss he can substantiate as arising from breach of indenture (*c*). (2.) In some instances the penalty is so much *per diem* during the unauthorised absence of the apprentice, and in this shape it closely resembles pactional damages; for it has been awarded in full where the apprentice had committed a crime which precluded his being received back by his master (*d*); and, on the other hand, it would probably be held to be a *maximum.* (3.) A third form of penalty is a provision for a penal service of a certain period of greater length, on account

of absence, ordinarily two days for each day. A stipulation of this nature is held to be in lieu of damages when the desertion of the apprentice has not been so long continued as to put an end to the engagement (*e*).

2. *How incurred.*—(1.) In cases where the conduct of the apprentice has been such as to relieve the master of his obligations, *e. g.* where he has been guilty of theft, the Court have awarded the full penalty in the indenture, when in the shape of pactional damages, without any deductions on account of aliment to the apprentice (*f*). But under a general clause, the amount of damages is a jury question, the penalty being the *maximum* of the cautioner's liability if he have not engaged for more (*g*). (2.) Continued desertion without sufficient cause, as terminating the engagement, opens a claim for the highest damages that are sanctioned by the indenture; and in such cases the penalty, unless pactional, is not necessarily the measure of the damages in a question with the apprentice, or even with a cautioner, if he have come under a general obligation. The same result will flow from repeated acts of desertion, if the master choose to seek damages rather than take back the apprentice (*h*). (3.) Where, again, the desertion or other breach of the agreement has not been such as to close the connection, the penalty, if a proper *liquidate penalty*, will cover the expenses of diligence, &c. occasioned to the master, as well as any small claim of damages for loss of service, if not otherwise estimated in the indenture. But when such estimation is made, as above observed, either by fixing a pactional sum *per diem*, or a penal service of a certain period for every day's absence, the master can demand no more than such sum or service (*i*). (4.) If, on the other hand, the breach of the indenture has been on the part of the master by harsh usage or neglect, or (if the apprentice have stipulated for bed and board) affording insufficient

or unwholesome food, or lodging devoid of ordinary comfort, the penalty will cover the expenses of diligence used by the apprentice and his cautioner for enforcing the stipulations of the indenture; but it is not to be considered as the *maximum* of damages if the apprentice, through continued breaches of the engagement on the part of the master, should be constrained to seek instruction elsewhere. And his leaving his service under such circumstances is not an act of desertion (*k*).

(*a*) AND FINALLY the parties bind and oblige themselves their respective heirs executors and successors to implement the whole of these stipulations to each other under the penalty of L. sterling to be paid by the party failing to the party observing or willing to observe the same over and above performance.

(*b*) Wright, 9th Feb. 1826, F. C., S. 4. 434.

(*c*) See Gunn *v.* Goodall, (Jury Sittings,) 21st July 1835, F. C., where this practically enforced.

(*d*) Maxwell, 8th March 1776, M. App. *Apprentice*, No. 1.

(*e*) Learmonth, 13th Feb. 1828, S. 6. 533.

(*f*) Maxwell, as in (*d*).

(*g*) See Gunn, as in (*c*).

(*h*) See Wright, as in (*b*), where an opinion was expressed that desertion once repeated was sufficient to put an end to the indenture at the master's option.

(*i*) See Learmonth, as in (*e*).

(*k*) See Munro, 7th July 1837, D. 15. 1262. In Smart, 18th Dec. 1794, Bar. Hume, p. 18, undue personal chastisement was held sufficient to liberate the apprentice from his engagement.

154. CLAUSE OF REGISTRATION (*a*).—(1.) This clause of the indenture is expressed in the ordinary form. (2.) It has been seen that opinions entitled to the highest respect have been expressed of the invalidity of summary warrants obtained against apprentices in the inferior courts to enforce return to their service and implement of the contract; (above, § 150. 2.) But these views appear, from the reports of the cases which have been cited, to be founded solely on the terms of the deed, which,

as containing a clause of registration for ordinary diligence, may reasonably be held as evidence of the intention of parties to exclude every other form of procedure, more summary, and thus more privileged. There seems, therefore, to be nothing in the way of a stipulation in this clause, that the parties, by consenting to the usual executorials, shall not be excluded from resorting to any other form of judicial procedure competent at common law to masters against their servants. (3.) A reservation of this kind appears, indeed, to be called for by the very nature of the forms of ordinary diligence; for it is not clear (in a practical view) that caption is effectual to enforce more than the pecuniary stipulations of the indenture (*b*); and these in many cases only against the cautioner, since the apprentice is frequently within the years of pupillarity, and thus protected from personal diligence. But it seems a still more formidable objection that the charge on a registered indenture is information to a refractory apprentice that he has six days to evade the execution of personal diligence. In effect, therefore, it would result in all those doubtful cases where a remedy instantly applied, or even threatened, would probably cause the return of the apprentice to his work, that the delay of some days makes a reconciliation impracticable, by producing confirmed desertion on the part of the apprentice by his flight to a distant part of the country, and thus creates a breach of the indenture that cannot afterwards be repaired.

(*a*) AND they consent to the registration hereof in the books of Council and Session or others competent for preservation and that letters of horning on six days' charge and all other legal execution may pass on a decree to be interponed hereto in form as effeirs and for that effect constitute their procurators, &c.

(*b*) See Jurid. Styles, 3. 751, foot note.

155. TESTING CLAUSE (*a*).—This clause is in the ordi-

nary form. The indenture is not privileged in the mode of authentication; but an informal indenture, like other imperfect deeds, may be validated by homologation (*b*).

(*a*) In witness whereof these presents written on this and the preceding pages of stamped paper by D. clerk to F. writer in Dundee are subscribed by the parties at Dundee the day of 1840 years before these witnesses the said D. and E. also clerk to the said F.

(*b*) Rymer, 19th July 1781, M. 17,056; Niel and Tait, 31st Jan. 1807, Bar. Hume, 20.

## TITLE II. THE SUBMISSION.

156. ORIGIN AND HISTORY.—1. *Ancient distinction between arbiter and arbitrator.*—Of the submission as a formal deed, the origin is obscure. But of arbitration, of which it is a branch, the history may, with some approach to certainty, be deduced from the books. The rules and forms of arbitration, although not immediately derived from the civil law, (for they are largely treated of in the *Regiam Majestatem*,) bear strong internal evidence of that origin (*a*). At the earliest period, the term arbitration had not, as at present, a generic application to all cases of reference. As expounded in the books of the Majesty, and by Balfour, *arbitration* and *arbitrie* were distinct both in form and effect. Arbitrie appears to have been *a quasi* judicial form, (the precursor in all probability of the modern judicial reference, so highly useful in practice,) and employed for determining disputed points by the intervention of an arbiter possessing the confidence of the parties, but at the same time according to the rules of law; whereas arbitration was a mode, *be friendlie dress and compositione*, of deciding debates and controversies betwixt parties probably upon a mere verbal reference (*b*). A corresponding distinction between *arbitrator*

and *arbiter* is met with in Craig, in the following passage: "Nor is the question dissimilar, whether a vassal may, "without the consent of the superior, compromit concern-"ing his fee, since compromission is a species of transac-"tion? For it may reasonably be doubted, whether he "who cannot alienate, should have the power to com-"promit. The learned make this distinction, that he "may indeed compromit to an arbiter, although not to an "arbitrator. The reason of the difference is, that an ar-"biter proceeds according to judicial form, and is guided "by it in all things, and as a vassal without the consent "of the superior is sometimes a voluntary, at others an "involuntary party to an action, so he may submit to an "arbiter, before whom questions are determined with "greater solemnity and consideration: Whereas an arbi-"trator neglecting all the forms of procedure, sometime "proceeds without any judicial ceremony, and in the ab-"sence of the parties, and matters are decided not accord-"ing to the letter of the law, but his own discretion (*c*)." It would likewise appear, that arbiters properly so called were usually chosen in presence of the judge before whom the dispute came to depend, and authorised by a proper judicial act, without the subscription of the parties (*d*); and after having accepted of the submission, they might be compelled to give judgment (*e*). But it is obvious that the distinction thus apparent from our early authorities, between the offices of arbiter and arbitrator, must have gradually been lost when the forms of their appointment became blended, and this in all likelihood resulted partly from the facilities given by statute to persons, themselves ignorant of writing, of authenticating private deeds by means of notaries (*f*); but in a great measure also, it must be supposed, from the increased spread of education, whereby those in the ordinary ranks of life acquired the means of transacting matters of com-

mon importance by means of the private submission, in place of resorting to the courts of law for their sanction to a judicial reference.

2. *Different forms of the submission.*—It appears accordingly, that in the beginning of the seventeenth century, the submission properly so called had acquired a substantive form, being framed so as to bind both the parties and the arbitrator or arbiter, (terms then indifferently used,) who added his subscription to the deed in token of his acceptance—at first an essential requisite in its authentication (*g*). This form we find in Dallas's collection (*h*), and it continued for a long period in practice, as appears from the decisions of the Court, and the styles published by Spottiswoode in the middle and end of last century. During this period the submission and decreet-arbitral were parts of the same contract or transaction, the latter being written at the end of the submission, and authenticated by the parties (but not the arbiter) at the same time as the submission, and containing a blank which was afterwards filled up with the particulars of the judgment or decree-arbitral. The whole was then closed by the subscriptions of the arbiters. (See *Decreet-Arbitral.*) This form seems to have given place to the existing style about the close of the last century, for even so late as 1787, a question under the stamp laws was determined on the principle, that the submission and decreet-arbitral formed parts of one and the same contract (*i*). Under the later statutes (*k*), the decreet is subject to a separate stamp-duty; and thus the old form, which was besides inconvenient as containing a blank for a decerniture, whereof it was plainly impossible to calculate the length beforehand, became incompatible with a due observance of the stamp laws.

3. *Modern application of the term arbiter.*—(1.) The ancient distinction between the terms *arbitrator and arbiter*

was thus lost when the form of voluntary submission took in ordinary practice, the place of the judicial compromission. Referees, by the tenor of the submission, were usually intrusted with a discretionary power to decide on mixed views of law and equity, so that their decrees were unchallengeable on the head of legal iniquity,—(a privilege now pertaining by Act of Sederunt to all decrees-arbitral proceeding on written submissions, which are reducible on the grounds of corruption, bribery or falsehood only) (*l*). And the word *arbiter* gradually became in practice a generic term, in all cases where controverted matters were, by formal submission, referred to the amicable decision of one or more persons,—in like manner as the word *arbitration* acquired a universal application to the subject of references. (2.) A branch of arbitration still remained, wherein the application of rules of law or equity was only incidentally if at all involved. To such belonged references to persons of skill in particular professions or trades, for fixing the amount of a price, or of expenses or damages, in connection with an agreement, and in which the question solely of *amount* or *quantity*, and not of *principle*, was thus at issue. These, and other similar matters of incidental debate involved in such references, contradistinguished from proper *lites* or subjects of controversy, were still said to be referred to the decision of an *arbitrator*, as differing from an *arbiter*, whose province it is to determine in regard to both law and fact (*m*); and the reference might be expressed either in the contract or agreement itself, or in a separate written or even verbal form. Between a reference of this nature and a regular submission there is also this material distinction, that in the former, the referee, as employed professionally, has action for professional remuneration, a privilege which does not belong to an arbiter (*n*). (3.) The term *reference* is now, in strict propriety, applied to those questions of controverted value or extent, which

thus belonged to the province of the mere arbitrator, a term wholly disused in recent practice. But in a general sense, the reference is of wide application, and employed not only for the determination of questions of mere quantity or amount, but those involving intricate legal points, where the nature of the controversy, the urgency of the case, or the value of the subject in dispute does not justify a formal submission. In such cases, the absence of probative writings may occasionally subject the transaction to future challenge, as probable only by oath of party; and it has been held that a mere *opinion* by way of advice, (*e. g.* an opinion of counsel,) contradistinguished from a proper *decree* or determination of the matters in dispute, is not binding (*o*); but the larger proportion of questions of this kind are discussed and determined among professional persons, in such a way as to exclude all risk of exception (*p*).

(*a*) See D. 4. t. 8; C. 2. t. 56.

(*b*) Balfour, *Arbitrie*, c. 2. 21.

(*c*) Craig, 3. 3. 21.

(*d*) Balfour, *Arbitrie*, c. 3. See 98 Jac. I. (1st July 1426); Laird of Balhagartis, 17th Dec. 1614, M. 644; Erskine, 10th Jan. 1615, M. 644.

(*e*) Balfour, *Arbitrie*, c. 10.

(*f*) 1540, c. 117; 1579, c. 80.

(*g*) A. *v.* B. 7th Jan. 1617, M. 662.

(*h*) Dallas's Styles. "The blank on the other side hereof, subscribed "by Sir G. M. of on the one part and R. G. of "on the other part, is to be filled up with the final sentence and decreet-"arbitral to be given and pronounced by Sir *John Cuninghame* of *Lam-"burghtoun*, advocat, as judge-arbitrator and amicable compositor neutrally "and mutually elected, nominat and chosen by both parties; and to the "which judge arbitrator, both the saids parties have submitted, and by thir "presents submit all claggs, claims, debates, and controversies standing "betwixt them, and specially that debate and controversy, *(described,)* con-"form to thir claims and answers to be given in by them to the said "arbitrator thereanent; with power to the said Sir J. C. (as arbitrator "foresaid) to decide, determine and give furth and pronounce his final sen-"tence-arbitral therein, betwixt the date hereof and the day of

" next to come: Likess the said Sir J. C. has accepted, and
" by thir presents accepts in and upon him the decision of the saids matters
" particularly and generally above submitted, and faithfully promises to
" meet and treat thereupon, and pronounce, give forth and deliver his final
" sentence and decreet-arbitral therein betwixt and the said day: And how-
" ever it shall please the said Sir J. C. to decide and determine in the
" premises, betwixt and the said day, both the saids parties bind and oblige
" them, their heirs and successors, to stand, remain and abide thereat, under-
" ly, and fulfil the same to one another, conform to the decreet-arbitral to
" follow hereupon in all points; And that but any appellation, reclamation,
" obstacle or again calling whatsomever, under the pain of
" to be paid by the party failzier to the party observer or willing to ob-
" serve the premisses, and by and attour the same and together therewith:
" Consenting thir presents (with the decreet-arbitral to follow hereupon,)
" to be insert and registrat in the books of Council and Session or others
" competent, to have the strength of a decreet of the Lords or Judges there-
" of interponed thereto, that letters of horning on six days, and others
" necessar, in form as effeirs, may pass hereupon; and to that effect con-
" stitutes thir procurators, &c.: In witness
" whereof the said parties have subscribed these presents, written by
" with their hands, at the day of
" before thir witnesses," &c.

(*i*) Drew, 31st Jan. 1787, M. 653.

(*k*) 55 Geo. III. c. 184, Sched. *v. Award.*

(*l*) Art. Regulat. 1695, § 25. See below, *Decreet-Arbitral.*

(*m*) See Spottiswoode's Styles, (5th edit.) 435; Robertson, July 1756, B. S. 5. 852; E. of Selkirk, Hailes, 780.

(*n*) Lord Glenlee, in Kennedy, 20th Jan. 1819, F. C. See below, *Decreet-Arbitral.*

(*o*) Dunfermline, 12th July 1626, B. S. 1. 35.

(*p*) See on this subject, Parker on Arbitration, 26. *et seq.*

157. PARTIES AND SUBJECTS.—1. *Who may submit.*—The rule, that they may enter into submissions who have the uncontrolled management of their own affairs, is scarcely broad enough. For, (1.) Pupils by their tutors, and minors with consent of their curators, as they may competently transact, so may they refer to arbitration questions and claims of a doubtful nature, but the former those affecting moveable property only; and the decrees-arbitral proceeding on their submissions are valid against the

opposing parties as precluded from challenge by personal exception, and can be set aside by the minor on the head of enormous lesion only (*a*). Minors who have no curators would seem, in the abstract, to have the power of entering into submissions, whether in relation to matters connected with their trade or profession, or other affairs (*b*). But no prudent opponent will risk a future question with a party thus unprotected, for an arbiter cannot exercise the prætorial power of naming a *curator ad hanc litem*. (2.) A factor *loco tutoris*, although his powers are less discretionary than those of a tutor, may in like manner refer claims of a moveable nature to arbitration; but the decree is subject to challenge, not merely on the head of lesion, but on the more general pleas of competency on the part of the arbiter, or the unfitness of the question for this sort of determination (*c*). Nevertheless the opposite party, who transacts knowingly, seems to have no remedy against a decree favourable to the pupil (*d*). (3.) The office of curator to fatuous and furious persons, being parallel in kind to that of tutor or factor *loco tutoris*, the powers pertaining to such offices are in this respect probably similar. (4.) Judicial factors, and factors on sequestrated estates, whose authority is merely protective, appear to have no power to submit to arbitration. (5.) Executors and voluntary trustees, being in law administrators of the property of others for the sole purposes of collection and distribution, it is not clear that they can submit doubtful questions to arbitration, unless they have special authority for this end in the deed of their appointment; but a statutory trustee, with consent of the commissioners, (although not the *interim* factor,) has this power by the terms of the bankrupt acts (*e*). (6.) *Curators bonis* may submit moveable claims without special authority from the Court (*f*). (7.) Mandataries and factors, appointed by individuals, seem to have no implied authority to refer to

arbitration under a general appointment (*g*); a rule which has been applied to the act of a single partner of a company entering into a submission in his own name, as taking burden on him for his copartners (*h*); although, in a question with the other party-submitter, he is bound, like all other persons acting in the names of others, to warrant his own title. (8.) A married woman may enter into a submission without the consent and concurrence of her husband, *first*, when she carries on a separate trade upon a stock which is exempted from the *jus mariti*, in relation to the affairs of such trade; 2*dly*, After a legal, or even voluntary separation, as regards the property which is settled for her separate maintenance (*i*); and, 3*dly*, In a question with her husband as to the amount of a separate aliment; and the allowance awarded derives much support from this particular mode of adjustment as a claim in bankruptcy (*k*). The point has been mooted, but not determined, how far an heir of entail in possession can enter into submissions concerning the fee of the entailed estate, which would affect succeeding heirs. The party having the opposite interest, in a question of this nature, might have difficulty in showing that the proprietor of a nominal right of fee, who in substance is a mere liferenter, could undertake a binding representation of future substitutes (*l*).

2. *Subjects.*—All private pecuniary or patrimonial rights seem capable of being ascertained and determined by means of arbitration, with the exception of those connected with or flowing from marriage (*m*). Rights to offices, and the like, which cannot be fixed by discretionary arrangement, but must be determined according to rules of strict legal interpretation, are not proper subjects of reference (*n*).

(*a*) Ersk. 1. 7. 18. 33; Ayton, 18th Jan. 1711, M. 16,331. Here

there was no determination of the question, but a mere *obiter dictum*. Aikenhead, 14th Nov. 1711, M. 16,331. This case related not to a submission, but a transaction. Williamson, Dec. 1739, M. 665, 8965; Brown, 15th June 1758, M. 16,359.

(*b*) Ersk. 1. 7. 18. 33, and notes (by Ivory) 227, 228.

(*c*) Falconer, 17th Feb. 1792, M. 16,380. See M'Dowall, 8th July 1778, M. 4058.

(*d*) Brown, as in (*a*).

(*e*) 54 Geo. III. c. 137; Bell, Com. 2. 415. See as to voluntary trustees, Bell, Pr. 1998; Parker on *Arbitration*, 260, *et seq.*, and opinion of Lord Medwyn, referred to.

(*f*) Corson, 10th July 1835, F. C., S. 13. 1093.

(*g*) Ersk. 3. 3. 39.

(*h*) Ersk. 3. 3. 20.

(*i*) This is deducible from the doctrine laid down by Ersk. 1. 6. 25.

(*k*) See M'Gregor's Trustee, 22d Jan. 1820, F. C.; Bell, Com. 1. 643.

(*l*) See Maule, 10th May 1816, Dow, 4. 363.

(*m*) Reg. Maj. L. 2. c. 8; Balfour, *Arbitrie*, c. 5.

(*n*) Ramsay, 19th Nov. 1624, M. 16,245.

158. EFFECT OF SUBMISSION ON JUDICIAL PROCEEDINGS. —1. *Stays action.*—(1.) The submission, accepted by the arbiters, of a claim forming the subject of a depending action, suspends all proceedings in court; but the effect of final decree, although perfecting the contract, is not to sopite or extinguish the action, but only to settle the controversy; and the pursuer may therefore revive the process, so as to obtain judgment in terms of the decree-arbitral (*a*). This doctrine is of much importance in reference to diligence used on the dependence of an action prior to submission. (2.) It follows, from the rule above explained, that inhibition or arrestment so used does not fall by submission and decreet-arbitral; but as diligence upon a dependence obtains complete effect only by decree in the action itself, it is essential, for securing such effect, that the pursuer shall return to court, and take decree conformably to the decision of the arbiters (*b*). (3.) In the submission of a depending process, a clause is usually in-

troduced, immediately after the second clause in the ordinary form, saving the process from falling asleep by the lapse of a year and day without any step being taken in court (*c*). This proviso is in practice held to be essential, on the ground that a proceeding suspensive of the action cannot at the same time operate to keep it alive. As this applies equally to judicial reference, a similar proviso ought to be introduced into the minute by which this latter proceeding is warranted. (4.) The submission of a depending process by the parties, without the concurrence or consent of the agents, would probably be regarded, as to their rights, in the same light as a compromise (*d*). (5.) Submission, duly accepted, bars a party from resorting to a court of law for enforcing a claim falling within its terms (*e*).

2. *Interrupts prescription.*—(1.) Submission, as being equivalent not merely to a demand by the creditor of his claim, as strong as that made by the execution of a summons, but even to joining issue in an action at law, interrupts prescription to the same effect as does a judicial demand; and the only question is upon the terms of the submission, whether it embraces the claim in question. (2.) A general submission, therefore, does not operate as an interruption of the prescription of any particular claim, unless followed by proceedings which point out the claims insisted in (*f*). (3.) It has been doubted whether an obligation to submit be a valid interruption; and this on the strength of a decision of the House of Lords, reversing a judgment of the Court, where the point is assumed to have occurred; but truly no such question there emerged; for the case related merely to an obligation by a son, who never came to be fiar of the estate against which the claim was made, to cause his father to submit a particular action to arbitration. And even supposing that the obligation had been by the party in the right, it could

not have been available in the circumstances of the case; for the claim maintained to have been saved from prescription was not the claim embraced by the process forming the subject of the submission, but the contents of a bond lodged as a production in that process; so that the submission of the process itself could not have interrupted the prescription of this particular bond, unless the defender's claim under the bond had likewise formed the subject of arbitration (*g*). (4.) In a case above referred to (*h*), a doubt was expressed if even a special submission, which had been cancelled, could operate an interruption. But this doubt must have had reference merely to the proof of the fact of a submission having been entered into, not to the question, whether a submission, which has expired without being exhausted, can have that effect; for it is only in such cases that the question of interruption could arise.

(*a*) Balfour, *Arbitrie*, c. 24.

(*b*) Reids, 3d July 1751, M. 6993; Stewart, 16th Feb. 1770, M. 7004; Anderson, 25th May 1821, F. C.

(*c*) PROVIDING and declaring that in case no decreet-arbitral shall be pronounced upon this submission before the space of a year and day after the date hereof and the same shall be allowed to expire the said process shall not be held as abandoned or as asleep but although there have been no step taken therein for more than the space of a year and day either of the said parties may insist therein in the same manner as before entering into the present submission.

(*d*) Parker on Arbitration, 247. See as to agent's hypothec, Bell, Com. 2. 35, *et seq.*; Pr. 1388, *et seq.*

(*e*) Robertson, 22d Jan. 1835, S. 13. 289.

(*f*) Garden, 26th Nov. 1743, M. 11,274; Vans, 14th June 1816, F. C. See Buchanan, 19th June 1765, M. 11,676.

(*g*) Hay, 9th March 1756, M. 11,276.

(*h*) Garden, as in (*d*).

159. CLAUSES OF THE SUBMISSION.—The ordinary form of the deed contains the following clauses: 1. *Clause of submission.* 2. *Clause empowering the arbiters to hear the*

*parties, and take probation; and obliging the parties to implement the decree.* 3. *Saving clause.* 4. *Clause declaring that the probation shall be valid in after questions.* 5. *Clause of registration.* 6. *Testing clause.*

160. CLAUSE OF SUBMISSION (*a*).—1. *Parties.*—This clause sets forth the designations of the parties, consisting of their names, surnames, professions, residences, or other unequivocal distinctive marks.

2. *Form of nominating the arbiters.*—It is a rule of practice that the arbiters shall be named. From the nature of the ordinary submission, which is entered into for the adjustment of existing differences, this is an ingredient in the preparation of the deed; and no prudent conveyancer, by leaving a blank for the name of the arbiters, to be filled up after subscription, would expose it to future challenge (*b*). But, in clauses of arbitration of prospective differences, in contracts having a considerable term of endurance, the nomination of an arbiter would, in many instances, be inoperative; and it is a common practice to appoint as arbiter an official person of eminent station, such as the Dean of the Faculty of Advocates *for the time being.* But a submission of this kind being in substance equivalent to a nomination which, in these circumstances, was disregarded in the leading reported case on this point, will not found a preliminary defence against an action upon the contract (*c*). In the precise case supposed, a similar determination seems indeed to have been given, but it is unreported (*d*). Where, again, the clause takes the form of an obligation to submit, or does not even describe the arbiters, but contains a blank for their names, the appointment has, in like manner, been held ineffectual to exclude a party from his remedy at law (*e*). Hence the practical rule may be deduced, to

name in all instances the arbiters, giving to the majority, or to any one of the number, and to the survivors, the powers of the whole. But, in practice, it would be considered highly unreasonable in the original parties to object to an arbiter chosen as above mentioned, although merely described by office.

3. *Who may be arbiters.*—(1.) Balfour, after the *Regiam Majestatem*, which again follows the civil law, affirms that neither a woman nor a minor can act as an arbiter (*f*); and although there is a very old decision in which an award by a minor was, in particular circumstances, supported by a bare majority of the Court (*g*), it has not been followed in practice. (2.) In other respects the choice of arbiters depends on the pleasure of the parties, who may validly renounce the objection of partiality, by knowingly choosing one who has an interest in the question submitted (*h*); and a reference by one party to another of what he should receive for an entry to lands, and even of the price of heritable subjects sold to him, has been sustained (*i*). It is hardly necessary to add, that these are instances of undue confidence, as the questions thus arising out of them abundantly prove, which are to be shunned, in place of followed, in practice. (3.) Interest in an arbiter afterwards emerging, disqualifies him from proceeding with the submission, to the effect even of transferring the cause to an oversman. (See *Decreet-Arbitral.*) (4.) Relationship to one of the parties, within the degrees which disqualify a judge, cannot affect an arbiter, if both are in the knowledge of the fact; because the objection is thus tacitly waived.

4. *Number of the arbiters.*—(1.) The parties may make choice of one or more persons as arbiters, at their pleasure, and of an even or odd number; for the authority of an old statute, which requires, under the pain of nullity,

that the number should be uneven, has been disregarded, and it must be considered as in desuetude (*k*). (2.) But whether the number be even or uneven, the weight of the more recent authorities seems to be in favour of the rule that they must all concur in every essential act (*l*), unless the powers of the submission be vested in the majority or any less number as a quorum; which may be done in the event merely of a difference in opinion (*m*). The number being even, where one-half refused to concur, the others were held to have no authority to decide, or even appoint an oversman (*n*). (3.) The full number of the arbiters, or the number of the quorum where such is appointed, must be maintained. This at least is the rule of the old law (*o*), and was assumed as undoubted in a case where one of several joint arbiters had renounced the office (*p*); and it is therefore, in all cases, advisable to confer the powers of the submission on the major part of the surviving arbiters, and the last survivor. (4.) The acceptance of the submission by the arbiters was of old expressed in the deed, which they accordingly subscribed; (above, § 156. 2.) It is now evidenced by a writing added at the end of the deed, which need not be holograph or tested (*q*). (See *Decreet-Arbitral.*)

5. *Appointment of an oversman.*—This appointment may be made, provisionally, in the submission, in the event either of the arbiters differing in opinion, or delaying to decide within a fixed period. In the latter case, the oversman's power to act is necessarily contingent on the expiry of the specified term, without a decree having been pronounced by the arbiters (*r*); but it is more usual to give power to the arbiters to devolve the cause upon an oversman, in case of difference in opinion. (See *Decreet-Arbitral.*)

6. *Matters submitted.*—The submission may be special, general or mixed. (1.) A reference to arbiters of

a *special* claim or ground of action is, from its nature, plainly exclusive of matters which are not comprehended within the express terms of the clause, or inseparably connected with such special subject-matter (*s*). (See *Decreet-Arbitral*). This kind of reference is most eligible, as clearly defining the jurisdiction of the arbiters. (2.) *General* terms receive a liberal interpretation; but, as in discharges the creditor is not held to acquit from a claim of an uncommon nature, which cannot be presumed to have come under his notice when granting the discharge, so a party will not be bound by a general submission, if the particular controversy be such as to call for special description. But on this subject no positive rule can be laid down. It was in an early case held, that a general submission of all actions, questions, quarrels or controversies, gave no power to pronounce upon rights to heritage (*t*); but this doctrine was, in a later case, modified by the qualification that a general clause submitting *all controversies* will sanction a decree-arbitral which disposes of the right to lands, provided that such right had been given in to the arbiters as controverted—in other words, formed the subject of a claim and the relative pleadings, as in discussion between the parties (*u*). And, without this test of controversy, a submission of *all controversies, questions, sums of money, and what either of the parties should do to the other thereanent,* was held to empower the arbiters to appoint one of the parties to renounce a heritable security in favour of the other (*v*). Even as regards questions concerning moveables, under a clause limited by such terms as *depending and subsisting*, there must be reasonable evidence that the matters embodied in a claim are truly controverted, if this be denied in the answers; and thus a decree-arbitral which determined a matter shown by an action that had depended between the parties to have never been at issue between them, was not protected by

a general clause of this nature (*w*). Reference to the pleadings in an action having thus been sanctioned to explain the meaning of parties, the like reference to a document showing intention, although not mentioned in the submission, was sustained in another instance where the clause was similarly expressed (*x*). Such questions are plainly in a great measure circumstantial. (3.) The clauses involved in these cases were general in one sense, but limited, in as far as they had reference to questions which actually subsisted at the date of the submission; but it is quite practicable to exclude the objections there taken, by submitting not only all questions and demands depending and subsisting, but all claims anywise competent to the parties or either of them; and under a reference thus expressed, the claims of parties will be the measure of their pretended rights (*y*). General submissions, however, are only advisable in the adjustment of disputes among copartners, and the like cases. (4.) Another sort of general reference is, where the parties refer all claims competent to one of them. Such terms will necessarily exclude counter claims by the other exceeding the sums demanded by his opponent, unless solely advanced as supporting a plea of compensation or set-off (*z*). (5.) It has been doubted whether a general clause, as ordinarily expressed, embrace actions in dependence between the parties (*aa*). But, in practice, this is understood (*bb*), and the dependence of an action is indeed very conclusive evidence that a question or difference subsists. But a doubt expressed by so competent an authority ought to be excluded, by introducing the word *actions*, or using a form similar to that given by Dallas (*cc*). (6.) It has been held in England that a general reference of *all matters in difference*, entered into by partners with each other, will authorise an award dissolving the copartnery. In Scotland, likewise, it is probable that the principle of the

cases above cited would lead to a similar result, provided the question of dissolution were truly in agitation (*dd*). (7.) A submission may be *mixed*, as of all claims under particular exceptions, or of special questions with a general clause. The former is construed as general in relation to every thing but the excepted claims; the latter follows the same rules with a mixed discharge, and is thus ambiguous (*ee*). (See *Discharge*.) A submission of this latter kind is particularly to be avoided. Indeed, when at all practicable, references ought to be special.

(*a*) The parties following viz. A. on the one part and B. on the other part have submitted and referred and hereby SUBMIT and REFER all demands claims disputes questions and differences depending and subsisting between them upon any account occasion or transaction whatever (*if the submission be special, or general and special, the special matter will be described*) to the amicable decision final sentence and decreet-arbitral to be pronounced by C. and D. arbiters mutually chosen by the said parties or in case of difference in opinion to F. as oversman or failing him by death or non-acceptance to any other oversman whom the said arbiters shall make choice of.

(*b*) See Deas, 25th May 1821, S. 1. 29.

(*c*) Buchanan, 25th June 1799, M. 14,593.

(*d*) Gordon and Davidson *v.* Keith, 5th June 1790, referred to in Buchanan, as above, and said (Parker on Arbitration, 28,) to be in Lord President Campbell's collection. The reference, as contained in articles of roup, was *to the amicable determination of the Lord Advocate and Solicitor-General for the time being, or either of them, as arbiters named for that effect.*

(*e*) Mylne *v.* Magistrates of Edinburgh, 16th Dec. 1769, and 18th Jan. 1770, affirmed 15th Feb. 1770, not reported; Davidson, 28th Feb. 1810, F. C.

(*f*) Balfour, *Arbitrie*, c. 2; D. 4. t. 8. c. 41; C. 2. t. 56. cap. 6.

(*g*) Gordon, June 1582, M. 8915.

(*h*) Johnston, July 1817, Dow, 5. 247.

(*i*) L. Ross, 22d July 1673, M. 2283; Montrose, 13th March 1639, M. 14,155.

(*k*) 87 Ja. I. (1st July 1426); Balfour, *Arbitrie*, c. 3.

(*l*) See, as adverse to the power of the majority, Bankton, 1. 23. 10; Sutherland, 5th June 1605, M. 14,719; Ireland, 28th Feb. 1666, M. 646; Cairncross, 8th Feb. 1704, M. 632. See, on the other hand, the statute as in (*k*); Ersk. 4. 3. 34; Riddel, 27th July 1694, M. 14,720. The case of

More, 10th Feb. 1693, M. 14,720, cited in the text of Erskine, related, not to arbiters, but persons appointed in a deed of settlement to divide a provision among children. See also, as supporting the rule as stated by Erskine, *Reg. Majest.* L. 2. c. 5; D. 4. T. 8, *De rec. qui arb. recip.* Cap. 17. § 5, 6.

(*m*) M'Callum, 3d June 1825, S. 4. 66, affd. W. S. 1. 344; Love, 1st June 1825, S. 4. 53.

(*n*) Watson, 18th Nov. 1696, M. 14,720.

(*o*) Balfour, *Arbitrie*, c. 9.

(*p*) See Cairncross, as in (*l*).

(*q*) I the within-designed A. arbiter nominated in the within-written submission hereby accept thereof and nominate E. writer in Edinburgh to be clerk thereto In witness whereof I have subscribed this acceptance written by the said E. on the back of the said submission at Edinburgh the day of before these witnesses, N. and I.

(*r*) Campbell, 28th Jan. 1612, M. 655.

(*s*) Ersk. 4. 3. 33. See below, *Decreet-Arbitral.*

(*t*) Paterson, 4th March 1612, M. 5064.

(*u*) Maxwell, 27th Feb. 1624, B. S. 1. 15.

(*v*) Kincaid, 15th Dec. 1631, M. 5064. The submission was of "all "controversies, questions, sums of money betwixt the parties, and what "either of them should do to others thereanent."

(*w*) Steele, 22d June 1809, F. C. (*Clause.*)—"The parties have sub-"mitted all demands, claims and disputes, questions and differences, de-"pending and subsisting between them, upon any account, occasion or "transaction whatsoever, to the amicable decision, final sentence, and de-"creet-arbitral to be given forth and pronounced," &c.

(*x*) Pitcairn, 24th May 1822, S. 1. 431, affd. W. S. 1. 194.

(*y*) See Dallas, (below, note (*cc*), where this test is expressly given as the measure of the arbiter's powers; Finlay and Co. 25th June 1834, S. 12. 792.

(*z*) Reid, 15th Dec. 1826, S. 5. 140.

(*aa*) Parker on *Arbitration*, p. 10.

(*bb*) Steele, as in (*w*).

(*cc*) Dallas, page 814. "All claggs, claims, questions, debates, controver-"sies, actions, suits of law, debts, sums of money, and what else debateable "controvertible betwixt the parties; and which they may anywise ask, and "seek or crave of one another, and have to lay to other's charges upon "whatsoever account, or for whatsoever cause, fact, deed or occasion pre-"ceding the day and date hereof, conform to their respective claims and "answers to be given in by either party against others thereanent, to the "arbiter."

(*dd*) Green *v.* Waring, Blackst. Rep. 1. 475. See Stark on *Partnership*, 270; Parker on *Arbitration*, 11.

(*ee*) Ersk. 3. 4. 9; Lord Incheffray, 4th March 1607, M. 5063.

161. POWER TO HEAR AND DETERMINE, AND OBLIGATION TO IMPLEMENT, &c. (*a*).—By this clause, the parties confer authority on the arbiters to take probation, &c. and bind themselves under a suitable penalty to implement the decree or decrees to be pronounced by the arbiters before the expiry of the submission. The procedure as to pleading, probation, &c. is considered below. (See *Decreet-Arbitral.*)

1. *Authority to pronounce decrees interim or final.*—(1.) The arbiters are ordinarily authorised to pronounce decrees interim or final, a power which ought to be clearly expressed, in order to leave no room for those questions of construction that frequently arise upon clauses which give no authority for interim decrees. For without the consent of the parties, it is by no means clearly ascertained in what cases and to what extent arbiters may issue decrees which do not exhaust the submission. Such are called *partial* decrees-arbitral. (2.) Thus in an early case, it was the opinion of the Court, that arbiters, by accepting a special submission of mutual claims, came under an implied obligation to exhaust its subject-matter, and that therefore a partial determination would have been invalid (*b*). In a later instance the submission was special, with a general clause superadded,—a form which was held to confer authority on the arbiters to limit their decision to the special subject-matter, provided only that no claim falling under the general clause, having connection with any of the particulars, were left undetermined; but an opinion was expressed, that in a submission of mutual claims wholly special or wholly general, the subject-matter, so far as brought under the view of the arbiters, must be exhausted (*c*). It seems indeed to admit of no question that

when claims are competently advanced under a submission, *hinc inde*, the arbiters cannot validly determine the claims of one party and leave undecided those of the other (*d*). Objections of this nature upon the terms of the clause are in general competent only to the party subjected in liability. A claimant who obtains decree in part has in so far succeeded; for, as observed by Kames, it is better in the ordinary case, for a party to have some of his claims decided than none (*e*); although circumstances may nevertheless occur, where one obtaining only part of his demand may have an interest to challenge the decree (*f*). But it is solely where such interest exists that his title will be sustained, *e. g.* if claims on his part remain undetermined that might have the effect of modifying or excluding those on the other side (*g*). And even such right of challenge will be excluded by the party accepting a limited decree, on the principle of personal exception, which has been allowed to be established by the evidence of the arbiters and clerk (*h*). (3.) The practical mode of excluding such questions, is to empower the arbiters (as in the clause exemplified in the notes) to issue interim decrees, which shall be valid although the submission should expire or be declared at an end without a final decree being pronounced: an authority of this sort is advisable to remove all doubt of the efficacy of such interim decrees unless as contingent on the submission being exhausted. It is indeed true that the objection was in two instances disregarded where the clause was not so expressed (*i*); but the opinions delivered in a later case may be thought to leave the point in some degree open to question, although the important specialty occurred, of an express reservation by the arbiters, in their interim decrees, of power to alter (*k*). But a clause even in the terms suggested will not, as a universal rule, make an interim decree absolutely binding from the date of its delivery or

registration. (See *Decreet-Arbitral.*) (4.) The power generally to pronounce interim decrees will be inferred from any terms clearly expressive of intention, such as, *whatever the arbiters shall determine in the premises in whole or in part*, or perhaps a mere consent in a future clause to the registration of interim decrees, although not mentioned in this clause (*l*).

2. *Term of endurance.*—(1.) Although the power to arbitrate is limited by the submission, the law interprets the particular clauses favourably to its endurance, on the strength of the maxim, *Quod interest reipublicæ componere lites* (*m*). Accordingly, when a specific day is mentioned, *betwixt and which day* the decreet shall be pronounced, such day is taken as part of the term (*n*). (2.) Where again the submission is silent as to the period of endurance, and does not contain the usual blank applicable to that period, or authority to prorogate, (which implies a limitation) (*o*), power in the arbiters to pronounce decree-arbitral at any time during the joint lives of the parties, and within the years of prescription, is implied (*p*). This determination goes beyond the old notion, for the submission was understood in these circumstances to expire by the lapse of a year and day (*q*), unless the arbiters had express power given them to decide when they pleased (*r*). (3.) Clauses of submission in contracts, which are not expressly limited in point of time, necessarily endure as long as the agreements to which they relate, since it is for the amicable settlement of disputes arising out of the subject-matter of the agreements that such references are made (*s*). (4.) The ordinary style of this clause, whether containing or omitting the words *next to come*, has been generally understood to import an endurance for a year and a day, or a full year exclusive of the day on which the submission expires. It is no doubt stated by a learned author, that the blanks in the phrase, *the* *day of*

*next to come*, cannot be filled up so as to denote a day beyond the year (*t*); but if, as seems to be generally conceded, the second blank denotes the corresponding month of the following year, the word *next*, as applied to the day of the month, must necessarily mean the day of that month numerically succeeding the day on which the submission is dated. The result in a recent case, which related to the corresponding blank in a prorogation, seems thus to be strictly correct (*u*). It is true that in some of the decided cases, in which the result did not depend upon a single day, the endurance is said to be a year, and not a year and day (*v*); but this may be thought an inaccuracy of language, into which some of our most learned writers, also, have fallen in treating of the parallel subject of the time within which a process falls asleep (*w*); although it seems unquestionable, that a process continues awake for a year and day after the date of the last interlocutor. And this inaccuracy appears more imaginary than real, if the passage in Erskine above referred to be compared with another in the same author (*x*). The expression year and day, as here observed, has a fixed meaning in our law; and the terms themselves may have been derived from the books of the Feus, where they are used to define the period within which the heir of a vassal behoved to apply for a renewal of his investiture (*y*). According, indeed, to our most ancient authority, the legal term of endurance was originally a year and day, even where the submission was silent on the subject (*z*). It may thus perhaps be concluded, that the term of endurance of a submission containing the ordinary blank is a year and day, or a year exclusive of the day of the date and that on which steps must be taken to keep alive the proceedings. (5.) The term of endurance runs from the concluding date of the deed, although the last subscription should be that merely of a cautioner for one of the par-

ties (*aa*). (6.) As the limitation of the endurance of submissions depends solely on the mode of expressing this clause, it does not apply to a judicial reference, which, as ordinarily expressed, is unqualified in point of time; and in practice it is understood, like any other remit by a judge, to be limited only by the endurance of the process itself; although proceedings before the referee while the process is asleep are incompetent unless consented to by both parties.

3. *Power to prorogate.*—(1.) Submissions whose endurance is limited may be prorogated by the parties, at pleasure, but by the arbiters, only within the term to which they are limited (*bb*). Prorogation by the arbiters is subject to the rules in point of endurance, which apply to the submission itself; in other words, the submission is continued for another term of the same length as the original term (*cc*). (2.) This power of prorogation is an improvement later than the time of Dallas, whose style of a submission is in this respect defective (*dd*). It would perhaps be a still farther improvement were the term of endurance altogether omitted, and prorogations thus rendered unnecessary. The limitation to a year and day can be no stimulus to a conscientious arbiter; whereas an arbiter whose regard for the interests of the parties is weaker than his habits of indolence, if he should not suffer it altogether to expire through neglect, a result by no means unfrequent, will prolong the submission by repeated prorogations to suit his own convenience.

4. *Penalty.*—(1.) By the terms of the clause under consideration, the penalty becomes a valid claim only after decree. Before the submission is brought to a close, a money penalty would be inapplicable to the situation of the parties, who have, by a concluded contract, given power to the arbiters to determine the matters submitted, and from which they cannot withdraw at their caprice. There

is thus in the hands of the arbiters a sufficient compulsitor against a party who will not plead,—that of deciding in absence; for had one of the parties, by the mere act of withdrawing his appearance, power to nullify the future proceedings, the absurd result would necessarily follow, that a submission was binding only during pleasure. (2.) The penalty as ordinarily expressed is, like other similar stipulations, a liquidate penalty validating a charge for the costs of diligence and other necessary expenses occasioned by delay or refusal to implement, but subject to the equitable restriction of the Court; (above, § 10. 5.) Without express words the penalty cannot be turned into pactional damages, even where the obligation prestable by the losing party is not pecuniary, but consists in the performance of a fact; and it may thus be advisable to vary the terms of the obligation, according to the nature of the subject-matter of the reference. (3.) The terms of the stipulation are the measure of the powers of the arbiter both as to existence and degree. Thus he cannot decern for more than the penalty, and in the absence of the stipulation, he cannot award the smallest coin in name of penalty (*ee*). It is not, however, to be hence inferred that a decree-arbitral cannot be enforced, when the submission is silent on the subject. The competency of legal diligence depends not on the stipulation of a penalty, but the form of the submission and decree-arbitral. If these are probative writings, with a clause of registration for diligence, execution will pass in common course. The successful party is merely precluded from charging for the expenses of diligence, (which are covered and liquidated by the penalty, when a penalty is stipulated, if they do not exceed it in amount); although he has action for them at common law.

(*a*) WITH POWER to the said arbiters or oversman to receive the claims of the parties take all manner of probation they may think necessary either

by writ witnesses or oath of party for determining the matters hereby submitted, and to hear the parties thereon AND whatever the said arbiters or oversman shall determine in the premises by decree or decrees-arbitral interim or final to be pronounced by them or him betwixt and the day of next to come or on or before any other day to which they shall prorogate this submission which they or he are hereby empowered to do at pleasure, both parties bind and oblige themselves their heirs executors and successors to acquiesce in implement and fulfil to each other under the penalty of L.100 to be paid by the party failing to the party observing or willing to observe the same over and above performance.

(*b*) Stark, 20th March 1630, M. 6834.

(*c*) Lord Lovat, 12th Jan. 1738, M. 625.

(*d*) Wishart, 30th June 1625, M. 17,013.

(*f*) See Reid, 15th Dec. 1826, S. 5. 140.

(*g*) Ersk. 4. 3. 33; M'Lellan, 9th July 1830, W. S. 4. 157.

(*h*) Arthur, 16th July 1773, M. 667.

(*i*) Taylor, 19th Jan. 1822, S. 1. 253; M'Kissock, 14th Nov. 1822, S. 2. 13.

(*k*) M'Nair, 31st May 1827, F. C., S. 5. 735, affd. 5 W. S. See Wilson, 1st Feb. 1833, S. 11. 345.

(*l*) Glover, (in House of Lords,) 11th Feb. 1805, *not reported;* Anderson and Miller, 6th Feb. 1836, F. C., D. 14. 447.

(*m*) Ersk. 4. 3. 32.

(*n*) Monteith, 21st Dec. 1614, M. 644; Wilson, 30th June 1694, M. 647; Cockburn, 21st Jan. 1724, M. 640.

(*o*) Menzies, as in (*u*).

(*p*) Ersk. 4. 3. 29; Hay, as in (*u*); Fleming, 7th July 1827, F. C., S. 5. 906. The opinion of a majority of the whole Judges was thus expressed: "As the letter of reference between these parties is not limited "to any determinate time within which the arbiters or oversman were to give "their award, and does not contain the usual blank as applicable to the dura-"tion of the powers of the arbiters, we are of opinion that the powers of "the arbiters and oversman did not expire at the lapse of a year from the "date of the letter of reference; and the parties were bound by the award "at whatever time pronounced."

(*q*) Balfour, *Arbitrie*, c. 9; Macanqual, 14th May 1563, M. 636.

(*r*) See Johnston, 6th July 1610, M. 637.

(*s*) Bryson, 10th June 1823, S. 2. 382; Halkett, 16th Dec. 1826, S. 5. 154.

(*t*) Ersk. as in (*p*). See Parker on *Arbitration*, 67, *et seq.*

(*u*) Dunmore, 13th May 1829, F. C., S. 7. 595, and auth. cited. See Bankton, 1. 23. 7; Sillartownhill, March 1539, M. 635; Hay, 25th Feb.

1630, M. 637; Menzies, Feb. 1665, M. 639; Arg^t in Fleming, as in (p); Terms of proviso at p. 165, vol. 2. of Jurid. Styles.

(v) Wallace, 23d Feb. 1672, M. 639; Stark, 23d Dec. 1820, F. C., (App. p. 3.)

(w) Stair, 4. 2. 3; Erak. 4. 1. 8. 62.

(x) 1661, c. 62; 1695, c. 24; Ersk. 1. 6. 42.

(y) F. 2. T. 24.

(z) Balfour, as in (q).

(aa) Taylor, 25th Nov. 1800, M. App. *Arbitration*, No. 8. See Johnston v. Cheap, (in H. of Lords,) 8th and 10th July 1817, Dow. 5. 247.

(bb) E. Linlithgow, 12th Jan. 1610, M. 636.

(cc) Dunmore, as in (u).

(dd) Dallas, (old edit.) 813.

(ee) Grosat, 24th Jan. 1739, M. 626; Gairdner, 10th July 1741, M. 627; Elch. *Arbitration*, 5.

162. CLAUSE SAVING THE SUBMISSION AGAINST DEATH, &c. (a).—1. *Effect of the death of a party.*—(1.) By the ordinary style of this clause, the parties *bind and oblige themselves, their heirs, executors and successors, to acquiesce in, implement and fulfil, &c.;* words which have been sustained as effectual to save the submission from expiring as a mandate by the death of any of the parties (b). (2.) But although the rule of practice is in all cases to use these terms, it has been held that a submission in another deed bearing reference to a bargain of sale, and thus the mode chosen by the parties for fixing the value of the subject, is binding on heirs although not mentioned (c),—a result which flows from the merely accessory nature of the reference. (3.) It has been argued that a submission by tutors or the like, not closed by decree-arbitral, expires as being an imperfect agreement, on the death of one of the quorum or other legal number who subscribed the deed (d); a result which may be doubted, because a writing executed by a quorum is effectual to bind the whole. (4.) And it was in the same case maintained, that a submission, signed by a legal quorum of tutors, falls by the expiry of their office before decree has been issued. But the question was not determined, the result turning on another point. A simi-

lar plea was disregarded in a later case, in which the circumstances were, however, special (*e*). (5.) A judicial reference like any other remit by a judge, if not previously exhausted by the referee, is limited only by the termination of the process, and does not fall by the death of a party (*f*). (6.) And it has been doubted whether the submission of a depending process does not also continue during the process, and thus form an exception to the general rule (*g*).

2. *Effect of assignation, legal, voluntary or judicial.*—(1.) In a case above referred to, it was maintained likewise that a submission falls by the legal assignation of marriage (*h*); but neither was this point determined, although it was held that the proceedings of the arbiters, subsequent to the marriage of a female who had an interest in the claim, were void, because the husband was not a party to them. (2.) In a recent case it has been ruled, that as the one party cannot, by means of a voluntary assignation of his claim to a stranger, put an end to the submission, his opponent is, on the other hand, excluded from the plea that it had by that step expired (*i*). (3.) And in the relative situation of a judicial conveyance by sequestration, it is now well ascertained that a submission continues to subsist; and that whether the claimant or respondent be the bankrupt, since the rule must be reciprocal (*k*). The same appears to apply to a conveyance by voluntary trust (*l*). It is merely a condition that the trustee and creditors shall have due notice to appear for their interest (*m*), of which the approved form is by an order of the arbiters served on the trustee by the clerk to the submission (*n*). (4.) The principle of these cases seems, therefore, to dispose in the negative of the question raised, as above stated, on the legal assignation of marriage. Provided the husband have due notice of future proceedings, it may perhaps be assumed that they will be valid.

(*a*) AND it is hereby declared that although either of the parties shall die or become bankrupt before final decree-arbitral be pronounced upon this submission the same shall nevertheless continue in full force and be with the decree or decrees-arbitral to follow hereon binding upon the heirs and representatives of the party deceasing or the creditors of the party becoming bankrupt and the arbiters or oversman are hereby empowered notwithstanding any law or practice to the contrary to proceed in and determine the matters submitted as if no such death or bankruptcy had happened.

(*b*) Ersk. 4. 3. 29; Ewing and Co. 19th Dec. 1820, F. C.; Pet. Macgrouther, May 1828, *not rep.*, noticed in Parker on *Arbitration*, 86. See Lady E. Maitland, 18th May 1796, M. 641; Grant, 23d June 1820, F. C.

(*c*) E. of Selkirk, 17th Jan. 1778, M. 627.

(*d*) See Lady E. Maitland, as in (*b*). The rubric is erroneous, neither of the points stated in it having been decided.

(*e*) Ferguson, 20th June 1828, S. 6. 1007.

(*f*) Watmore, 17th May 1839, F. C., D. B. M. 1. 743.

(*g*) Lord Mackenzie in Watmore, as in (*f*).

(*h*) Lady E. Maitland, as in (*b*).

(*i*) Henry, 29th Jan. 1835, F. C., S. 13. 361.

(*k*) Anderson, 25th May 1821, S. 1. 31; Cases as below.

(*l*) See Whitehead, 16th Nov. 1833, F. C.

(*m*) Barbour, 21st Nov. 1811, F. C.

(*n*) Grant, 23d June 1820, F. C.

163. CLAUSE PERPETUATING THE PROBATION (*a*).—The purpose of this clause is expressed in the form exemplified below. (1.) Probation, whether by witnesses or oath of party, taken in a regular submission which has been allowed to expire before decree, appears to be perpetuated, as regards the parties, by law (*b*); but as objections to the competency of parole evidence or the admissibility of the particular witnesses are competent (*c*), this clause is usually introduced. It may perhaps be doubted, however, whether these objections can be excluded, unless by express words; for although the admission of evidence, even irregularly, by arbiters, cannot be excepted to in a court of law to cut down a regular decree-arbitral, it may not be so clear that an agreement to perpetuate evidence taken in a submission shall be held to refer to testimony which is irregular and incompetent, as well as what is

legally admissible. (2.) The depositions of witnesses or oath of party which it is desired to perpetuate, ought perhaps to be formally attested; because, although for the information of the arbiters themselves, these are in practice taken down and authenticated as in judicial proceedings, a doubt may be raised how far such authentication would make them valid evidence in a future action at law (*d*). (3.) But the evidence of the witnesses examined is not exclusive: the parties are at liberty in a future action to adduce other evidence, or even to re-examine the same witnesses, if still alive, on cancelling their prior depositions (*e*). Such privileges are not meant to be waived by the general clause under consideration.

(*a*) AND the parties hereby agree that in case no final decree-arbitral shall follow hereon all probation to be taken by the said arbiters or oversman shall be held and received as legal probation *quantum et quale* in any after submission or process at law between the parties touching the premises.

(*b*) Ersk. 4. 3. 36.

(*c*) Last reference.

(*d*) See Wright, 2d Jan. 1708, M. 14,033; Sochan, 30th Nov. 1709, M. 14,034. The inference from these cases seems to be, that an oath of party, authenticated by the subscriptions of the deponent and arbiters, is probative; but not the depositions of witnesses. But in the later cases of Cuningham *v.* Chalmers, 27th Nov. and 15th Dec. 1733, and 24th March 1740, M. 14,044, Elch. *Proof*, 1, Craigie and St. 1. 267, and Duke of Gordon, 2d Nov. 1748, M. 14,045, the depositions of witnesses were received in future proceedings apparently without objection on the head of informality.

(*e*) Cuningham, D. Gordon, as in (*d*).

164. CLAUSE OF REGISTRATION (*a*).—(1.) This part of the submission is expressed in a form which warrants execution only after decree, and embraces also the decree. Anciently the clause was so conceived as to warrant execution against the arbiters; but it was found that such was practically excluded, because the submission, as a branch only of the contract of arbitration, cannot be separately registered (*b*). (2.) Where an interim-decreet,

warranted by the submission, has been pronounced, and diligence becomes necessary, the submission, as well as the decree itself, must be registered, as containing the warrant for registration and diligence. In these circumstances the submission remains in the register; and this cannot occasion any inconvenience, because the extract issued embraces both the submission and interim-decreet (*c*). (3.) It is to be noted, that this clause warrants summary execution against the parties only, and not also their representatives, who must be proceeded against by ordinary action. (4.) Where a consent to registration has been omitted, it may be supplied by a mutual minute (*d*); but such is not essential to the validity of the proceedings: a decree-arbitral may be enforced by ordinary action. (5.) The days of charge are the usual days of law, fifteen days, if particular *induciæ* be not expressed (*e*).

(*a*) AND the said parties consent to the registration hereof and of the prorogations and interim or final decreets-arbitral to follow hereon in the books of Council and Session or others competent that letters of horning on six days' charge and all other legal execution may pass upon a decree to be interponed hereto in form as effeirs and for that purpose constitute their procurators, &c.

(*b*) Dallas, (old edit.) 814. The clause of registration commences thus: "Consenting thir presents, (with the decree-arbitral to follow hereon,) be "insert and registrat," &c.

(*c*) It is observed by Parker, (p. 262,) that the principal submission may be got back before it is engrossed in the register, for any temporary purpose, such as the addition of a minute of prorogation; but any writing on the submission, *after* an extract has been issued, ought perhaps to be avoided, as such would thus be rendered useless in the future procedure so soon as the deed had been returned to the keeper.

(*d*) Baillie, 19th May 1829, S. 7. 619. (*Terms of minute.*)—"Considering that an omission has occurred in the registration clause, in so far "as the parties have not consented that the decreet of the arbiters or overs-"man should be recorded, and summary diligence done thereon, the parties "consent that the decree to be pronounced by the oversman be recorded "in the books of Council and Session, or others competent, and that letters "of horning pass and be directed thereon in common form."

(*e*) See Balfour, 17th Jan. 1706, M. 6861.

165. TESTING CLAUSE (*a*).—The submission, as not being a privileged writing, requires the solemnities of formal deeds (*b*). But although this is the practical rule, from which it is unsafe to deviate, it has in more than one instance been held that improbative submissions or references are homologated by the parties pleading before the arbiter (*c*). The occurrence of such cases is the best proof of the disadvantages attending neglect of the legal rules, whether by practitioners, or arising from the unassisted preparation of writings of importance by the parties.

(*a*) In witness whereof these presents written on this and the preceding pages of stamped paper by C. clerk to E. writer to the signet are subscribed by the parties as follows viz. by the said A. at Edinburgh the day of 1840 before these witnesses G. and H. both servants to the said A. and by the said B. at Glasgow the day of the month and year last mentioned before these witnesses J. and K. both clerks to L. writer in Glasgow.

(*b*) Hamilton, 28th July 1708, M. 16,970.

(*c*) Telfer, 21st Jan. 1735, M. 5657, 17,032; Hepburn, 1st Dec. 1736, M. 5658; Taylor, 25th Nov. 1800, M. App. *Arbitration*, No. 8.

166. MAY THE PARTIES RESILE?—The submission is, in strict language, an incomplete transaction prior to decree; but as the intermediate power to resile would be entirely inconsistent with the nature and purpose of arbitration, it is regarded as a mutual and irrevocable commission to the arbiters to declare the terms of the agreement, as soon as they, by acceptance, shall have undertaken to decide the controversy (*a*),

(*a*) Balfour, *Arbitrie*, c. 8; Macanqual, 14th May 1563, M. 636.

## TITLE III. DECREET-ARBITRAL.

167. HISTORY.—(1.) The decreet-arbitral, as already observed, (above, § 156. 2.) was originally a mere appen-

dix to the deed of submission, and left blank in the substantial parts, although subscribed by the parties in order to serve as a warrant to the arbiters to insert the terms of their judgment. It was completed by the attested subscriptions of the arbiters. (2.) At that period the arbiters, in token of their acceptance of the office, usually subscribed the submission at the same time as the parties, and joined in the consent to its registration for summary execution; and it seems to have, in this case, been considered legally binding on them to decide the matters submitted (*a*). But there was found to be a practical difficulty in enforcing the obligation thus contained in the old deed of submission; because it could not be registered for execution until the decreet-arbitral indorsed upon it had been completed; and in one instance this was made the ground of a special application to the Court for a warrant to charge one of several arbiters to subscribe the decree (*b*). It was held in accordance with the rule of the civil law (*c*), that the arbiter, as having accepted of the submission, could be compelled to give his opinion; but, as a matter of course, if he differed from his co-arbiters, that he could not be required to subscribe the decree. (3.) Hence it followed, that where there were two or more arbiters, it would have been impracticable to force a decision; because the plea of difference in opinion was open to any one arbiter against whom compulsory steps were taken, or if the majority were resolved to renounce, it was in the general case easy to discover individual grounds of variance. In a later case it was accordingly held, that one of two arbiters can neither be compelled to decide, nor name an oversman, for the reason that he is not obliged to concur in either step (*d*); but no opinion was expressed as to the obligation undertaken by a sole arbiter by his acceptance of the submission, which, subject to the equitable powers of the Court in sustaining a

valid excuse, is in practice considered binding (*e*). It is advisable, therefore, that, in terms of an ancient statute (*f*), arbiters should be of an unequal number, and the majority, or a certain number, as a quorum, have power to pronounce decree. (4.) After the procedure in submissions had become more formal and deliberate, and the inconvenience been felt of filling up the blank before communication with the parties, the decree took the occasional form of a minute, which, if subscribed by the arbiters during the submission, was held sufficient to authorise the insertion of its terms in the blank after the submission had expired (*g*). As this plainly made the separate minute almost equivalent to a formal decree-arbitral, excepting in the mode of enforcement; and as the judgments of arbiters are in the general case voluntarily implemented, so that the form of a minute would thus become frequent in practice, it must often have been found impossible to engross its terms in the narrow space left for the purpose, when a formal decree became necessary. Hence, and from the operation of the stamp laws, it is probable that the separate minute thus sanctioned as valid evidence of the decerniture gradually acquired the modern form of the decreet-arbitral. That the stamp laws were thought to affect this writing when it began to acquire a separate form, appears from a case above cited, which involved an objection to a decreet-arbitral that it was written on the same sheet with the submission; and the effect of the opinion of the Court, that the submission and decreet-arbitral, as forming parts of one and the same contract, might competently be engrossed on the same sheet of stamped paper, could be but temporary, as the terms of the existing stamp act apply specially to an award or decree-arbitral (*h*). Thus the decree-arbitral acquired its present shape.

(*a*) Chiesly, 30th June 1699, M. 632; Jerviswood, 4th Dec. 1702, M. 9435; Cairncross, 8th Feb. 1704, M. 632.

(*b*) Jerviswood, as in (*a*).

(*c*) D. iv. t. 8. (*De rec. qui arb. recip.*) L. 3. § 1. It would seem, however, that he only could be compelled to decide, *qui arbitrium pecunia compromissa receperit.*

(*d*) Millie, (or White,) 7th July 1796, M. 633.

(*e*) Parker *on Arbitration*, 233. See Bankton, 4. 45. 132-3.

(*f*) 87 Ja. I. (1st July 1426.)

(*g*) L. Alter, 2d March 1636, M. 646; Pitcairn, 2d Dec. 1680, M. 647.

(*h*) Drew, 31st Jan. 1787, M. 653; 55 Geo. III. c. 184.

168. CLAUSES.—These are, 1. *Narrative of the submission and procedure.* 2. *Principal decerniture.* 3. *Decerniture for penalty and expenses.* 4. *Appointment to registrate for execution.* 5. *Testing clause.*

169. NARRATIVE (*a*).—This clause sets forth the names and designations of the arbiter or arbiters or oversman by whom it is pronounced; and after shortly narrating the terms of the submission so as to identify the separate deeds as parts of the same transaction, states more or less fully the procedure before the arbiters.

(*a*) We A. and B. arbiters mutually chosen by C. and D. conform to submission dated entered into betwixt them on the one and other parts CONSIDERING that the said C. and D. thereby SUBMITTED and REFERRED to us and in case of difference of opinion between us to any oversman to be chosen by us all claims disputes and differences subsisting between the said parties and particularly without prejudice to the said generality (*special matters referred*) and which submission contains full power to us or to the said oversman to find either party liable in the expense of the said deed of submission and to decern therefor and to award to either party the whole expenses to be incurred by him in the course of the said submission and whatever we the said arbiters or the said oversman should determine in the said matter thereby submitted between the date of the said submission and the day of the said parties submitters bound and obliged themselves and their respective heirs and successors to implement and perform to each other under the penalty specified in the said submission as the same conferring sundry other powers on us and the said oversman and containing sundry other clauses in itself

more fully bears FURTHER considering that having accepted of the said submission and having once prorogated the same in virtue of the powers therein conferred on us conform to the prorogation written on the back of the said submission dated the and having CONSIDERED the matters thereby submitted to us and in particular the claims lodged by the said A. and B. answers thereto and other pleadings and productions for the parties and proof adduced on their part (*or either of them as the case may be*) and heard the parties (*or their agents or counsel as the case may be*) thereon and on the whole subject-matter contained in the said claims and others and being well and ripely advised in the said matter and having God and a good conscience before our eyes.

170. NARRATIVE OF THE PROCEDURE.—1. *Acceptance.*—(1.) The arbiters, by the usual practice, accept of the submission by a formal minute (*a*); but express evidence of acceptance is not essential: it is necessarily inferred from the procedure in the submission (*b*); and therefore a written acceptance need not be holograph or attested. (2.) Formal acceptance is, however, of importance in this respect, that it forecloses the parties from withdrawing from the submission, which, until the arbiters shall have undertaken the office, cannot be considered as a concluded agreement; and accordingly it appears to be revocable, prior to that step, by either submitter (*c*).

2. *Appointment of a clerk.*—(1.) The arbiters, at the same time that they declare in writing their acceptance of the submission, usually (although not necessarily) appoint a person versant in the details of business to act as clerk to the submission. (2.) The ordinary duties of the clerk consist in preserving the deed of submission, claims, pleadings and productions, and giving the parties access to them; keeping a record of orders, minutes, prorogations, and other incidental steps of procedure, and intimating these to the parties in a written form; preparing and adjusting the decree or decrees-arbitral, getting these signed by the arbiters or oversman, and delivering them to the party in whose favour they are pronounced, or putting

them on record if so ordained. (3.) The clerk, although appointed for the convenience of the parties, is under the control of the arbiters; and the possession of the clerk is accordingly the possession of the arbiters (*d*).

3. *Prorogation.*—(1.) The power in the arbiters to prorogate is necessary in those submissions only which contain a term of endurance. In such as are unlimited in point of time a power to prorogate may be hurtful, as it has been held to limit the endurance to a year and day (*e*). (2.) Prorogation must be authorised by the submission, and made within the term of endurance (*f*); but the parties may themselves prorogate at pleasure (*g*), and that either expressly by a formal written consent, which may be for any period they agree upon, or tacitly, by concurring in the procedure before the arbiter, after the expiry of the submission (*h*); but this latter course leaves uncertain the term at which the implied prorogation shall terminate. (3.) A prorogation is valid and probative of the date it bears, although neither holograph nor tested, as being analogous to the interlocutory proceedings in processes at law (*i*). It is usually written at the end of the submission; but it is valid in a separate form, and does not require a stamp, even although executed by the parties without a reserved power in the submission (*k*). (4.) Devolution to an oversman does not imply a prorogation of the submission (*l*); and such can give no power to the oversman to prorogate, unless the power be conferred on the arbiters themselves. It has even been made a question whether an oversman can prorogate without an express devolution of the authority possessed by the arbiters (*m*); but the point seems to be settled in favour of authority in the oversman to exercise the lesser power of prorogation, as he possesses the greater of pronouncing decree, to which the former, on the assumption that it is contained in the submission, is plainly subservient (*n*). (5.) The

submission cannot be prorogated by the arbiters, by filling up the blank term of endurance with a day beyond the year (*o*). An operation of this nature on a completed writ would plainly be invalid without the authority of the parties; and it is hardly to be doubted that such authority, if given, would be held incapable of legal proof, except by writing or subsequent homologation. (6.) The endurance of a prorogation, in the ordinary form, is a year and day (*p*), and without express authority in the submission the term cannot competently be extended beyond that period by one and the same prorogation; although the arbiters may, by repeated prorogations, keep the submission alive for any period within the course of prescription, provided they themselves, or the number authorised to decide, live so long.

4. *Pleading.*—(1.) The rule on this head, that the parties shall be fully and fairly heard, is not restricted by any technical forms of pleading. The claims (*q*) and discussion may be verbal, or in writing, at the pleasure of the arbiters, or as may be arranged between them and the parties, it being of course desirable that the latter should be satisfied with the mode of pleading adopted. Written claims are in all cases advisable, and written pleadings are usually prepared in cases of intricacy and importance, more especially if a proof should be in view; and this necessarily implies that each party shall see and have an opportunity to answer the opposite statements (*r*). (2.) It is material that the parties shall be allowed to state their case, fully and fairly, prior to decree or any intermediate investigation, by proof, inspection of property, or the like, on which the decision may possibly turn, and receive due notice of every important step in the procedure. It is a rule also well ascertained in practice, that the parties shall have distinct information of the substance of an intended decree-arbitral; which is usually given by means

of written notes, prepared by the arbiters, and formally communicated by the clerk to the submission; although such information is not to be considered essential to the validity of a decree, when express arrangement or peculiar circumstances render it superfluous. These rules flow necessarily from the terms of the second clause of the submission; (above, p. 321); but, as equitable in themselves, they apply to every species of arbitration, whether by submission, or private or judicial reference. (3.) But as the notes of the arbiters are intended solely to certiorate the parties of the views of the arbiters, they cannot be founded on as affecting or explaining a final decree, which may have proceeded upon altered views produced by future consideration or the observations of the parties. They are competent evidence merely of the extent (if doubtful) to which the subject-matters have been determined—a rule which applies likewise to the claims of the parties; and it is unnecessary, although it may thus be convenient, to preserve these after final decreet (*s*). (4.) An oversman has necessarily the same powers, and is subject to the same rules in regard to pleadings and procedure, as the arbiters; it being superfluous however, in the general case, for an oversman to order written pleadings, excepting on special points.

5. *Proof.*—(1.) An arbiter has the same powers as any other judge to allow or refuse a proof or the oath of party, and in his discretion to decide upon the statements of the parties, and his own knowledge of the matters submitted (*t*)—powers which ought manifestly to be exercised with great caution. But if a particular course of inquiry is pointed out in the submission, such cannot be departed from without the consent of both parties; and after a proof has been granted, they ought to be allowed, as in pleading, to complete their case, and for this purpose to adduce all competent evidence (*u*). (2.) The proof

may be on commission (*v*), although the arbiter has no power, of his own authority, to enforce the attendance of witnesses or havers; but the Court (in the words of Erskine) *grant warrants in course* to supply the want of direct power in the arbiter (*w*); and these are competent as well against havers, (holders of writings,) as witnesses (*x*). The interpretation in practice put upon the words, *warrants in course*, led to the convenient form of obtaining the supplemental authority of the Court by a *pro forma* application in the Bill-Chamber by plack bill. But a case appears in the reports in which this practice was disapproved, and the course laid down of applying to the Court or the Judge Ordinary by petition (*y*). And as the Court have, in one instance, refused to grant warrant for bringing witnesses out of their own county (*z*), a commission may become necessary by the refusal of witnesses resident in another county to attend the arbiter for examination. (3.) It has been held that an arbiter is not tied down by technical objections, and may receive evidence which would be inadmissible in a court of law (*aa*). (4.) As he may decide without a proof of the averments of parties, so is it competent for him to obtain the information necessary to satisfy his own mind without examining witnesses formally upon oath; and such is understood in practice. But it would be a questionable exercise of discretion to refuse to put a witness on oath if desired by a party, although it has been held that an objection on this ground, not stated at the time, is incompetent after decree (*bb*). (5.) It is clearly understood, that whether a witness be sworn or simply interrogated, a sole arbiter may take down his testimony in the way most convenient for himself. The effect is for his own mind alone. But when there are two or more arbiters, it must be convenient to have a full record of parole evidence, because mere notes may vary; and upon afterwards considering their

decision, the views of the arbiters might thus differ. And there can be no doubt that evidence taken by a commissioner, which is intended not for his own use but that of the arbiter, must be fully written down. In practice, depositions of witnesses, &c. in submissions are authenticated as in judicial proceedings. (See above, § 163.)

6. *Interim orders or appointments.*—These, if relating merely to the course of procedure, are necessarily competent whether the submission contain, or be wanting in a power to pronounce interim decrees; but interlocutory orders, *e. g.* to consign money, must proceed either on an express finding, or an assumption that the party is under obligation. Such orders, therefore, are substantially interim decrees, and to be capable of enforcement as such, must be sanctioned by the submission. But as orders which are *ultra vires* of the arbiters may, like any other interlocutory steps, be recalled by the arbiters at any time before final decree, reduction, as not essential for this purpose, is incompetent during the course of the submission (*cc*).

7. *Employment of professional persons.*—(1.) It is well ascertained in practice that arbiters may take the assistance of accountants, land valuators, and the like, for their guidance in professional matters; and in difficult cases it is not to be doubted that they may obtain the opinion of counsel on matters of law. The expenses thus incurred in preparing for a decision, form a valid charge against the parties, or such one as may be subjected in payment of them by the arbiters (*dd*). (2.) But they cannot delegate the power of directly determining the subject-matters of the submission, or any part of them, without the consent of the parties (*ee*).

8. *May the proceedings be closed ex parte.*—The general rule, that the parties must be fully and fairly heard, can apply only in those cases where both are ready and

willing to exhaust the cause; otherwise it would follow that either party could at his pleasure put an end to the submission. It is accordingly held that arbiters may proceed to give judgment *ex parte*, provided due notice or certification have been served on a refractory party that he will, after a certain date, be held as confessed if he fail to plead, lead evidence, or appear for examination, &c., as the case may be (*ff*).

9. *Oath of the arbiters.*—The first clause closes with the words, *having God and a good conscience before our eyes*, which have been thought an essential part of the decree (*gg*). A case having occurred in which the Court appear to have regarded these words as in some measure answering to the oath *de fideli* of a judge, and remitted to the Lord Ordinary to supply their omission by administering an oath to the arbiter, it is advisable in all cases to insert them in the decree (*hh*).

10. *Effect of death, bankruptcy, or denuding of parties.*—In the event of the death, bankruptcy, or denuding of the original parties, or either of them, it is a question of importance in what form the decree shall be conceived. (1.) In those cases where heirs and representatives are expressed in the submission, the representatives of a party will be entitled, on the one hand, and obliged on the other, to take the place of the deceased, excepting as regards summary diligence. And they are bound by a decree in a submission forming part of an agreement, although not mentioned in the submission; (above, § 162. 1.) (2.) On the occurrence of bankruptcy or sequestration, the decree may go out for or against the voluntary or statutory trustee as such; (above, § 162. 2); but it has been doubted if a trustee, who sists himself a party to a submission, can be found liable, in this proceeding, even *qua* trustee, to pay the expenses incurred during his appearance (*ii*). In so far, however, as regards the subject-matter of the submis-

sion, it does not admit of doubt, that as a trustee may claim *active*, so the estate under his charge may be subjected in liability *passive*; and it is probable that, on the same principle, expenses would be awarded if sued for in an ordinary action. (3.) But, under no form of representation can the opposite party avail himself of the privilege of summary diligence, any more than in the ordinary case of a bond or other writ bearing a clause of registration for execution, which is wholly personal; (above, § 15. 3.) (4.) The same rules are thought to apply to an assignee, whether voluntary or legal. Such may obtain decree, *active*, in virtue of his conveyance; but whether he appear or not, his right will be affected by an unfavourable decree, since a party cannot make a submission void by merely assigning away his claim; (above, § 162. 2.) (5.) Parties who were minors at the date of the submission may obtain decree in their own name on the expiry of the tutory or curatory; and they are liable, on the other hand, to be subjected in direct liability.

11. *Devolution to an oversman* (*kk*).—(1.) An oversman may be named by the parties in the deed of submission, (above, § 160. 5,) or at any period whether before or after the expiry of the submission, provided the arbiters (being of an equal number) have differed in opinion; or with their consent, if any obstacle have occurred to stop the progress of the submission (*ll*). (2.) But a devolution or reference to an oversman, by the arbiters, can be made only under authority contained in the submission; although it may be prospective, in the event of a difference occurring; and it must empower the oversman to determine all the points which have not been decided by the arbiters themselves by valid interim awards (*mm*). Such devolution may be by a writ subscribed by the arbiters without the observance of the rules of attestation (*nn*); and for the purpose of registration it is generally engrossed at the end of

the deed of submission. (3.) A devolution made after the occurrence of a difference in opinion exauctorates the arbiters; not so when prospective, in the view of a possible difference (*oo*). (4.) It is not absolutely essential that the difference of opinion, necessary for devolving the submission on an oversman originally named in the deed itself, should be formally expressed in writing: it may be inferred from facts and circumstances; (below, § 171. 2.) Nevertheless, as a rule of practice, such declaration is advisable, in order to exclude future question.

(*a*) Jurid. Styles, 2. 169.

(*b*) Gardner, 19th Jan. 1773, M. 659.

(*c*) Balfour, *Arbitrie*, c. 8.

(*d*) Robertson, 20th June 1783, M. 653.

(*e*) Menzies, 24th Feb. 1665, B. S. 2. 137.

(*f*) E. of Linlithgow, 12th Jan. 1610, M. 636.

(*g*) See Donaldson, 26th Jan. 1770, M. App. *Arbitration*, No. 1.

(*h*) Johnston, 9th June 1817, Dow, 5. 247. Opinion of the Court in Fleming, 7th July 1827, F. C., S. 5. 906. A prorogation of this kind must, it is thought, last for a year and day: it would plainly be no proper prorogation were either party empowered at pleasure to put an end to the proceedings. But the opinion of the Court did not go so far; and it was unnecessary to decide the point, as decree had been actually pronounced.

(*i*) Stewart, 8th March 1804, M. 16,911; Kirkaldy, 16th June 1809, F. C.; Gordon, 10th Dec. 1812, F. C. See to the contrary Bankton, 1. 23. 8; Sutherland, 1744, M. 652; Ersk. 4. 3. 29, note *.

(*k*) Paterson, 15th May 1829, S. 7. 616. The plea, that there was here substantially a new submission, was repelled.

(*l*) Thomson, 28th Jan. 1818, F. C.

(*m*) M'Bryde, 8th July 1748, M. 657. The objection was repelled on the construction of the clause, which, as containing the words, *or any other day to which* THEY *should prorogue the submission*, was held to confer a power of prorogation on the oversman as well as the arbiters; both having been previously mentioned.

(*n*) Glover *v.* Glover, (in the House of Lords, 11th Feb. 1805, *not rep.*, noticed in Parker on *Arbitration*, 159.

(*o*) Wallace, 23d Feb. 1672, M. 639.

(*p*) Dunmore, 13th May 1829, F. C., S. 7. 595.

(*q*) Kincaid, 15th Dec. 1631, M. 5064.

(*r*) See Brown, 22d July 1675, B. S. 2. 187.

(*s*) Brown, as in (*r*); Sharp, 24th Feb. 1815, Dow, 3. 102; Heggie and Son, 1st Feb. 1825, S. 3. 488; Glennie, 24th Feb. 1825, S. 3. 574, affd. W. S. 3. 389; Love, 1st June 1825, F. C., S. 4. 53; M'Callum, 3d June 1825, S. 4. 66, affd. W. S. 2. 344; Bell, 8th Dec. 1825, S. 4. 286; Flounders, 14th Feb. 1826, S. 4. 459; Spearman, 28th Feb. 1828, S. 6. 645; Ferguson, 20th June 1828, F. C., S. 6. 1006; M'Phersons, 23d June 1831, S. 9. 797; Finlay and Co. 25th June 1834, S. 12. 792; E. of Dunmore, 28th Jan. 1835, F. C., S. 13. 356; Baxter, 20th Feb. 1836, F. C., D. 14. 549.

(*t*) Kirkaldy, 16th June 1809, F. C. This case was special. The oath of one party, demanded by the other, would have been a mere oath of opinion, the question being as to the value of farm stocking; and the arbiter had otherwise before him what he considered sufficient evidence: therefore the reason assigned by him (severe bodily affliction) for not taking the party's oath was sustained as sufficient. See Johnston, 9th June 1817, Dow, 5. 247. The arbiter had been chosen as a competent judge of the matters submitted, which related to the mode of executing improvements on property. Union Canal Co. 3d Dec. 1836, D. 15. 194.

(*u*) Heggie and Co. 1st Feb. 1825, S. 3. 488. See Alston, 17th Dec. 1839, F. C., D. B. M. 2. 248, and opinion of Lord J. C. Boyle.

(*v*) Berry, 26th Jan. 1831, F. C., S. 9. 337.

(*w*) Ersk. 4. 3. 31; Ker, 6th Jan. 1690, M. 634.

(*x*) Stevenson, 26th June 1696, M. 634.

(*y*) Harvey, 7th July 1826, F. C., S. 4. 809.

(*z*) Gordon, 16th July 1741, M. 634.

(*aa*) Berry, 15th Dec. 1827, S. 6. 256. The witness had been held inadmissible by the Court in the action which formed the subject of the submission.

(*bb*) Stewart, 21st Feb. 1822, S. 1. 335.

(*cc*) Halley, 9th July 1833, S. 11. 942.

(*dd*) See M'Leod, 17th Dec. 1825, S. 4. 330.

(*ee*) Stark, 20th March 1630, M. 6834; Stewart, 23d Feb. 1709, M. 6836.

(*ff*) See Glover, 11th Feb. 1805, in H. of Lords, noticed in Parker on *Arbitration*, 104; Greenhead Foundry, 1819, (Parker, 105,) decided by Lord Pitmilly and acquiesced in. A party to a submission who had disregarded the orders of the arbiter, and refused to consent to a prorogation to afford time for further procedure, was held as confessed notwithstanding a protest, the arbiter at the same time adopting the precaution of taking the oath in supplement of the other party in support of his claim. Spearman, 28th Feb. 1828, S. 6. 645. A party obtained from the arbiter a certain

period for consulting counsel, which was afterwards prorogated; and at length, the opinion not being forthcoming, decree was pronounced against him. It was in these circumstances supported by the Court.

(*gg*) Russell, Theory of Conveyancing, 117. See to the contrary, Bankton, 1. 23. 11.

(*hh*) See Parker on *Arbitration*, 170.

(*ii*) Lord Fullerton, in Whitehead, 16th Nov. 1833, F. C.

(*kk*) We C. and D. arbiters in the within submission having differed in opinion with regard to the matters submitted do hereby in terms of the powers thereby conferred on us refer the whole matters therein submitted to us to the sole determination of E. as oversman and we do hereby nominate and appoint him oversman accordingly In witness whereof we have subscribed these presents written by F. clerk to the said submission at the day 1840 years before these witnesses G. and H.

(*ll*) Balfour, *Arbitrie*, c. 14, 19.

(*mm*) See Runciman, 24th May 1831, S. 9. 629.

(*nn*) Stewart, 8th March 1804, M. 16,911; Kirkaldy, 16th June 1809, F. C. See to the contrary Heriot, 20th June 1780, M. 661.

(*oo*) Bryson, 10th June 1823, S. 2. 382.

171. PRINCIPAL DECERNITURE (*a*).—This part of the decree necessarily varies with the subject-matter of the submission, and no particular rules can be laid down for its style. The observations under this head must therefore be general.

1. *Number who can decide.*—(1.) The question, by what proportion of several arbiters a decree can be pronounced, depends wholly on the terms of their nomination; (above, § 160. 4.) (2.) When power is given to the majority, in the event of a difference in opinion amongst the arbiters, it has been made a question by what evidence such difference must be shown. It was in one instance held, that variance not merely means difference in opinion on the merits, but includes the case of a minority withdrawing from a share in the proceedings; and a decree by the majority was sustained (*b*). In a later case, a decree by two out of three arbiters so authorised was sup-

ported without evidence of variance under the hand of the third, which was merely set forth in the narrative of the procedure (*c*).

2. *Oversman.*—The powers of an oversman named in the submission, being contingent on a difference of opinion among the arbiters, some evidence of such difference must appear in the absence of a formal declaration by the arbiters. (1.) It has been held, that a variance cannot be established by the evidence of third parties (*d*); but, in one instance, the testimony of the arbiters, oversman and clerk, appears to have been received (*e*). (2.) And a statement by the oversman in his award, that the difference essential to his powers emerging had taken place, supported by concurring circumstances shown by the proceedings, has been sustained (*f*). Such cases are plainly special, and their occurrence serves as a lesson to the practitioner to adhere strictly to form. (3.) Where, again, a decree had been pronounced by the oversman and one of the arbiters, it was supported without evidence of variance, although not even stating the fact of a variance having taken place (*g*). (4.) In those cases where the power of devolution is given to the arbiters in the event of their differing, it is not enough that they shall execute a devolution: they must expressly declare a difference (*h*). (5.) A devolution and difference in the one case, and a difference in the other, duly evidenced, denude the arbiters, and invest the oversman; and therefore the decree ought to be by the latter only.

3. *Reasons of decision.*—These ought, in the general case, to be given with much caution; for although an error in judgment is not a ground for setting aside a decree-arbitral, circumstances may occur in which the rejection of a claim, on a particular ground, may exclude a demand upon a separate head under the terms of the submission (*i*). Nor would it be altogether advisable at the

present day (although such things have been done at a former period) (*k*), to set aside, for example, an acknowledgment for money *in gremio* of a deed, upon mere parole evidence. When arbiters, therefore, really decide in their own minds upon the whole circumstances of a case, they should be careful to avoid any statement of particular reasons, which in such circumstances plainly have no existence.

4. *Interim decree.*—(1.) It has been stated that arbiters have no power to determine a part only of matters specially submitted, without authority to that effect in the submission; (above, § 161. 1.) (2.) But an interim decree duly authorised is still from its nature subject to qualification or recal, in cases of mutual claims, or involving pleas of compensation (*l*). Even where the claims are all on one side, a final decree, assoilzieing the other party in whole, has been sustained as taking away the effect of a prior interim decree for payment in part (*m*); but this would appear to have continued under the control of the arbiters; and it seems very plain, that an unqualified interim decree, authorised by the submission, and completed by delivery or registration, cannot be affected unless by making good a counter claim, or proving payment. If the submission have expired before final decree, the test of the efficacy of an interim decree, as a valid ground of charge, still is, whether it be authorised by the submission; but as manifest injustice might thus be done to a party, unless he could, in another form, obtain substantially what he was entitled to have demanded from the arbiters had the proceedings not come prematurely to a close, he may, in the form of reduction, or an action of repetition, establish counter claims, or even prior payment of the sums awarded, so as to take off the effect of the interim decree. In one instance, the Court, in a suspension, required the charger to find caution to pay back sums so awarded, in

the event of the interim decree being afterwards set aside in the proper action (*n*). (3.) It is different, where an interim decree is expressly qualified with a reserved power in the arbiters to deal with it in the future proceedings as they shall see fit, or granted under a condition, such as caution to pay back if appointed to do so, which, by the expiry of the submission, can no longer be enforced. Such does not become the property of the party (like a final decreet) by the expiry of the submission (*o*); and it may be assumed that it would not do so even by delivery or registration.

5. *Decree must be within the powers of the arbiters or oversman.*—(1.) That the arbiters have no power to go beyond the limits of the submission—*ultra fines compromissi*, flows necessarily from the nature of their office, which is wholly conventional. The powers of arbiters under general, special and mixed submissions depend upon rules above explained; (§ 160. 6.) It is an inflexible rule, that no decree can stand which it was *ultra vires* of the arbiters to pronounce (*p*); but a partial reduction in some instances meets the justice of the case. (2.) When the excess appears on the face of the award, and can be separated from the other matter, the decree is set aside as to the excess only (*q*). On a similar principle an *error calculi* may be rectified, and the decree will in other respects be sustained (*r*). (3.) On the other hand, where the excess of power is of such a nature as to pervade the whole decerniture, *e. g.* attaching personal liability to one who has appeared in the character of trustee, the Court will not interfere to rectify the award, as being wholly void (*s*).

6. *Particular cases as to excess of powers.*—(1.) Under a submission of all claims depending and subsisting at its date, the arbiters plainly have no power to determine matters afterwards arising, or appoint discharges to be granted with reference to future claims (*t*); although

they may validly ordain deeds having reference to the subject-matter determined by their decree, to be prepared at their own sight, or that of third parties, which is simply a mode of implementing the decree (*u*). Nor is it an excess of power to take into consideration the prospective value of property, when such forms an element in the claims of parties (*v*). (2.) It was long a controverted point, whether arbiters are entitled to remuneration for their trouble. It appears, indeed, to have at an early period been assumed, that arbiters had no claim in law to a recompense (*w*). But in a later instance, an opposite view was taken (*x*); although it has always been understood, that without the concurrence of the parties arbiters cannot decern for a sum to be paid to themselves (*y*), either directly, or under cover of a charge made in name of their clerk (*z*),—a practice which is said to have prevailed in some places, and has been severely reprobated (*aa*). Within a recent period, however, the Court have returned to the original view of this matter, and, with the exception of one instance, where special circumstances weighed with them in awarding remuneration to an arbiter, who was truly employed as a professional architect under that name (*bb*), it has uniformly been held that the office is in itself gratuitous, unless by a stipulation prior to the submission, (at least to any material procedure,) the parties have agreed to a certain amount or rate of remuneration (*cc*). The rule is however universally acted on in practice to present arbiters with a *honorarium* at the close of the proceedings, bearing some proportion to the amount of labour bestowed by them, and a party advancing a reasonable sum on this account may recover a moiety from the other by ordinary action (*dd*). (3.) A different view is taken of the actings of a judicial referee, who is understood to have a claim to remuneration like any other reporter; a view which appears in a recent instance to have

been sanctioned by the Court; and accordingly, his fee is regarded as an item of advance, which the party to whom expenses are awarded may include in his account (*ee*). (4.) Arbiters cannot indirectly exact what they have no right directly to demand, and by keeping possession of their final decree, compel payment of a charge for trouble (*ff*). (5.) But in references to tradesmen, for fixing the value of property or the like, and forming part of an agreement, the rule is different, and the referee has a legal claim, by way of action, to remuneration for trouble as well as reimbursement of outlays (*gg*). (6.) It is within the powers of arbiters to award a fee to their clerk, and to bind the parties in payment of the expenses attending remits to professional persons (*hh*). (7.) And it is now fixed that it is competent for arbiters and judicial referees, without express authority, to find expenses due by one party to the other. These are regarded as accessory merely to the principal subject-matter of the submission, on the same principle as in an action at law. Expenses found due in a submission ought uniformly to be ascertained by taxation or modification, because unless specially decerned for, *numerata pecunia*, they cannot be recovered by summary diligence (*ii*). (8.) Arbiters may appoint a yearly sum decerned for in name of aliment to be invested in security, without a clause to that effect, as implied in powers intended to operate prospectively for a course of years (*kk*).

7. *Rules of construction.*—(1.) The terms of a decree-arbitral are interpreted according to their plain meaning, neither party having a better right than the other to a favourable construction; and the use of technical words being excluded by the nature of the transaction, in which it is not essential that the arbiters shall be lawyers. Thus the value of land is construed to be the worth of the subjects freed of all yearly burdens of a private nature, which were not in the view of the arbiters; because they are

supposed to proceed by ocular inspection of property (*ll*). (2.) The construction cannot be aided by extraneous explanations or evidence. The parties to a submission enter into an agreement to act as the persons therein named shall direct, and the decree is therefore binding on them, as part of a mutual contract, the sole conditions being that it shall be fairly pronounced, and within the powers of the arbiters. A final decree-arbitral is thus, like any other contract or deed, the subject of construction, as the legal evidence of the meaning of the arbiters, but not of explanation. As it cannot be altered or amended without the consent of the parties, so it is not subject to be controlled by the interpretation of the arbiters, which, as it might differ from the legal construction, is wholly rejected (*mm*). (3.) But these rules are inapplicable to a judicial reference of a depending process, for the reason, that until the award of the referee be sanctioned by the Court, the proceedings are still open; and as a judge must have the inherent power to withhold his sanction from an ambiguous award, it is probable that in such circumstances the Court would call upon the referee to explain or rectify it (*nn*). (4.) A submission embodied in a contract or other deed is likewise an exception, the full and distinct determination of the questions referred being an essential part of the agreement, without which it is consequently incomplete (*oo*). (5.) It is not a question of construction, to what extent the subject-matters have been determined, and to show this, the written procedure under the submission is competent evidence (*pp*). (6.) Nor is it a question of construction, what are the limits of a right declared by the decree to belong to one of the parties. Such may be cleared, if doubtful, by a court of law (*qq*).

(*a*) We do hereby GIVE FORTH and PRONOUNCE our final sentence and decreet-arbitral as follows viz. (*particulars of judgment*) And farther we find the said C. (or D.) liable to the said D. (or C.) in the expense of the said

deed of submission and of the expenses incurred by him in the said submission both of which we hereby modify to the sum of L. sterling and DECERN and ORDAIN the said C. (or D.) to make payment to the said D. (or C.) of the same and also of the expense of recording the said deed of submission and this decreet-arbitral And on the said C. (or D.) implementing to the said D. (or C.) this our decree-arbitral we declare him freed and discharged of all claims under or in virtue of the said agreement (*a general or particular discharge as the case may be*) and decern and ordain the said C. (or D.) to execute and deliver to the said D. (or C.) at his own expense a valid discharge accordingly.

(*b*) Love, 1st June 1825, F. C., S. 4. 53. But here it was shown by the procedure in the submission that all the arbiters had considered the case after it was prepared for decision, and that there had been a difference of opinion.

(*c*) M'Callum, 23d May 1826, W. S. 2. 344. The fact does not however appear to have been disputed. See note (by Ivory) 191, Ersk. 1019.

(*d*) Telfer and Co., 30th Jan. 1823, S. 2. 167.

(*e*) Colquhoun *v.* Corbet, 17th Dec. 1783, noticed in books of Sederunt. See Parker on *Arbitration*, 154.

(*f*) Gardner, 19th Jan. 1773, M. 659, Hailes, 511, B. S. 5. 430. See Middleton, 9th June 1821, Robertson, Ap. 391.

(*g*) Dunsmoor, 30th July 1745, M. 656. The authority of this case may perhaps be doubted. It is plain that the fact of a difference having taken place could be deduced only from the concurrence of one of the arbiters with the oversman, which was at any rate required by the submission, to give effect to a decree.

(*h*) Gordon, 30th Nov. 1716, M. 655. The decree was reduced, although there was not only a devolution, but a prorogation granted for enabling the oversman to act, because a difference was not declared.

(*i*) See an example in Fergusson, 20th June 1828, F. C., S. 6. 1006, where the use of the expression, *in all the circumstances of the case*, saved the decreet from reduction, which would probably have resulted, had the arbiter's notes been received in evidence of the grounds of decision.

(*k*) See Young, 2d July 1678, B. S. 2. 230.

(*l*) See Balfour, *Arbitrie*, c. 13.

(*m*) Johnston, 6th July 1610, M. 637.

(*n*) See Taylor, 19th Jan. 1822, S. 1. 253.

(*o*) M'Nair, 31st May 1827, F. C., S. 5. 735, affd. W. S. 5; Wilson, 1st Feb. 1833, S. 11. 345.

(*p*) Ersk. 4. 3. 32-3; Steele, 22d June 1809, F. C.

(*q*) Bankton, 1. 23. 20; Crawford, 23d Dec. 1702, M. 6835. Here a general discharge ordained to be granted in a special submission was

restricted to the matters in controversy. Montgomery, 13th June 1798, M. 631; Kid, 19th June 1810, F. C. See opinion of Lord Robertson in favour of the rule stated in the text, and that of the late Lord Meadowbank for a total reduction. Stewart, 21st Feb. 1822, S. 1. 335.

(*r*) Hetherington, 21st June 1771, M. App. *Arbitration*, No. 3; Nasmyth, 20th June 1776, and 18th Nov. 1777, B. S. 5. 427. See opinions of the Judges in Steele, as in (*p*). The distinction between an error in calculation or arithmetic, and an error in principle leading to a wrong balance on accounts, is exemplified in Morrison, 5th June 1823, S. 2. 366, affd. 26th April 1825, W. S. 1. 143. The latter, if falling within the scope of the submission, is irremediable.

(*s*) See Whitehead, 16th Nov. 1833, F. C.

(*t*) M'Kenzie, 11th June 1751, Elch. *Arbitration*, 9. The decree, according to a rule above explained, was restricted, not wholly set aside.

(*u*) Erskine, 30th July 1714, M. 649. The principle of this case extends to other similar matters, such as the measurement of land, preparation of title-deeds, sufficiency of securities, and the like.

(*v*) Pitcairn, 24th May 1822, S. 1. 431, affd. W. S. 1. 194.

(*w*) See Kilkerran's report of Napier, 20th Nov. 1746, M. 5729.

(*x*) Dunlop, 1777, B. S. 5. 428.

(*y*) Jack, 6th March 1777, M. App. *Arbitration*, No. 5, Hailes, 753, B. S. 5. 429.

(*z*) Montgomery, 13th June 1798, M. 631; Stewart, 21st Feb. 1822, S. 1. 335.

(*aa*) Lord J. C. Boyle in Kennedy, 20th Jan. 1819, F. C.

(*bb*) Macallum, 26th June 1810, F. C., (Lord Pr. Blair diss.)

(*cc*) Kennedy, 20th Jan. 1819, F. C.: the arbiter was an accountant. Paterson, 19th Feb. 1819, F. C., (in note, p. 635 of vol.): the arbiter was an architect. See Baillie, 19th May 1829, S. 7. 619: an opinion was expressed by Lord Pr. Hope, and assented to by the majority, that a prior stipulation is valid; but that even in such case an arbiter has no power to pronounce decree for the sum thus agreed on. Fraser, 30th May 1838, F. C., D. 16.

(*dd*) Jolly and Son, 12th Dec. 1834, F. C., S. 13. 188; Edin. Oil Gas Co. 6th Feb. 1835, S. 13. 413; Drummond, 11th March 1835, S. 13. 684.

(*ee*) Baxter, 1st June 1838, F. C., D. 16. 1085. The referee, in order to exhaust the matter of expenses, which fell within the reference, remitted to the auditor to tax the expenses, inclusive of his own fee, if it should be the pleasure of the Court to find him entitled to a fee. Effect was given to this remit, and the whole fee stated against the losing party.

(*ff*) Blair, 12th Jan. 1798, M. 664.

(*gg*) Lord Glenlee, in Kennedy, 20th Jan. 1819, F. C.

(*hh*) M'Leod, 17th Dec. 1825, S. 4. 330.

(*ii*) Berry, 15th Dec. 1827, S. 6. 256, and 26th Jan. 1831, F. C., S. 9. 337; Paterson, 15th May 1829, S. 7. 616; Smith, 15th June 1830, S. 8. 920; Fairley, 11th Feb. 1836, D. 14. 470; Robertson, 16th Dec. 1836, D. 15. 199.

(*kk*) Fergusson, 20th June 1822, F. C., S. 6. 1006.

(*ll*) Corstorphin Road Trus. 1st July 1794, Bell's (fol.) Cases.

(*mm*) Bankton, 1. 23. 22; Williamson, 18th June 1777, B. S. 5. 428; Woddrop, 4th Feb. 1794, M. 628; Reid, 15th Dec. 1826, S. 5. 140.

(*nn*) See this done of consent in Anderson, 22d June 1833, S. 11. 778.

(*oo*) Kid, 28th Nov. 1828, S. 7. 82. See Reid, as in (*mm*).

(*pp*) Love, 1st June 1825, F. C., S. 4. 53; Bell, 8th Dec. 1825, S. 4. 286; M'Callum, 23d May 1826, W. S. 2. 344.

(*qq*) Cunninghame, 20th Dec. 1836, D. 15. 295.

172. DECERNITURE FOR EXPENSES AND PENALTY (*a*). —1. *Expenses.*—These may be awarded to either party without express authority in the submission; (above, § 171. 6.)

2. *Penalty.*—It is, as a matter of course, *ultra vires* of arbiters to decern for more than the penalty expressed in the submission (*b*). But it would seem that a decerniture for the penalty is superfluous, the stipulation to pay the agreed-on penalty in case of failure to implement being sufficiently expressed in the submission; (above, § 161.)

(*a*) And we the said arbiters decern and ordain both parties to implement and fulfil this decreet-arbitral in all points to each other under the penalty of L. contained in the said submission to be paid by the party failing to the party performing or willing to perform his part thereof over and above performance.

(*b*) Grosat, 24th Feb. 1739, M. 626; Gardner, 10th July 1741, Elch. *Arbitration*, 5.

173. APPOINTMENT TO REGISTRATE (*a*).—(1.) For the reason expressed in § 172, this seems in like manner to be a superfluous although a usual clause. The agreement in the submission to the registration, both of the submission and decree-arbitral, cannot be weakened by the existence of the document to which it refers. (2.) The arbiters have

accordingly no power to authorise summary diligence unless warranted by the submission (*b*); and therefore in the absence of a consent by the parties, as above expressed, (§ 164,) the decree can be enforced only by an ordinary action (*c*). (3.) The submission and decree forming together a mutual contract, may be put on record by either party; but when the decree-arbitral has been delivered to one as being wholly in his favour, the Court will not interpose to force it out of his hands, in order to its registration by the other, unless the latter can show a pecuniary or patrimonial interest in the document (*d*).

(*a*) AND we ordain the said submission with our acceptance thereof the said prorogations and this decreet-arbitral to be registered in the books of Council and Session or others competent to the effect specified in the said submission.

(*b*) Ersk. 4. 3. 31; Knox, 12th March 1707, M. 625.

(*c*) Balfour, *Arbitrie*, c. 23; Wood, Nov. 1583, M. 624; Knox, 12th March 1707, M. 625.

(*d*) Dickson, 1st Dec. 1830, F. C., S. 9. 100.

174. TESTING CLAUSE (*a*).—This part of the deed is in the common form. (1.) A decree-arbitral, whether interim or final, is not a privileged writ, and must therefore, for the purpose of diligence or action, or otherwise to serve as legal evidence, be authenticated according to the statutory forms (*b*). (2.) It must be subscribed by the whole arbiters, or the authorised number, according to rules above expressed; (above, § 160. 4.) (3.) It cannot be executed beyond the term of the submission, unless with the express consent of the parties (*c*).

(*a*) In witness whereof I have subscribed these presents written on this and the preceding pages of stamped paper by B. writer in Edinburgh clerk to the said submission at Edinburgh the day of 1840 years before these witnesses the said B. and C. my servant.

(*b*) Short, 3d July 1711, M. 16,867; Haliburton, July 1708, M.

16,970; Percy, 25th Nov. 1808, F. C.; Runciman, 1st May 1831, S. 9. 629. See Campbell, 2d July 1831, S. 9. 875.

(c) Balfour, *Arbitrie*, c. 19; Bankton, 1. 23. 10; Donaldson, 26th Jan. 1770, M. App. *Arbitration*, No. 1; Freeland, 28th Feb. 1666, M. 646; Watson, 18th Nov. 1696, M. 648;

175. Is DELIVERY NECESSARY?—(1.) This question, as respects a final decree, has been determined in the negative. The decree becomes irrevocable on the expiry of the submission, and as being part of a mutual contract is valid, although remaining in the custody of the arbiters or their clerk, out of whose possession it may be obtained by means of an action of exhibition (*a*). But pending the submission, a decree is still subject to review, and is consequently not binding prior to delivery; and it may be retained by the arbiters so long as the submission endures, the possession of the clerk being in this question the possession of the arbiters (*b*). (2.) An interim decree has been held to follow a different rule, and not to take effect on the expiry of the term of endurance. For this there seems to be no valid reason when the decree is authorised, and it is to be observed, that the case referred to involved an important specialty (*c*).

(*a*) Simpson, 10th Dec. 1736, M. 17,007, Elch. *Arbitration*; Note, (by Ivory,) Ersk. 638.

(*b*) Robertson, 20th June 1783, M. 653. See to the contrary, Bankton, 1. 23. 22.

(*c*) M'Nair, 31st May 1827, F. C., S. 5. 735, affd. W. S. 5. The interim decrees contained an express reservation of the power of further consideration and determination.

176. OBJECTIONS EXTERNAL TO THE DEED.—1. *Act of Regulations of* 1695.—(1.) Decrees-arbitral proceeding even on formal deeds of submission were of old reduceable on the ground of enormous lesion to the party, or of iniquity (judicial error) in the arbiter (*a*); but by Act of Sederunt of the Court, it is declared that they shall be objectionable

only in respect of falsehood, or of bribery or corruption on the part of the arbiters (*b*). (2.) By falsehood, in the sense of these regulations, is meant forgery or vitiation of the submission or decree, and it has been held not to embrace grounds of decision unfounded in fact (*c*), unless the fact be in itself essential to the validity of a decree, *e. g.* the full and fair investigation of the case or the due hearing of parties (*d*); which will not be taken as proved by the mere assertion of the arbiters in their decree. (3.) Corruption, again, on the part of an arbiter, has been inferred from his accepting a gratuity during the course of the proceedings (*e*); interference in obtaining his own appointment, joined to connivance with one party in prevailing on the other to submit a matter truly not controverted (*f*); involving his own affairs with the subject-matter of the submission, or even acquiring an interest in the issue after the date of the reference (*g*); bargaining with a party for remuneration before delivering the decree (*h*); or exercising undue influence over a co-arbiter (*i*). The same result may be predicated in all cases where arbiters, from whatever cause, decide without exercising their independent judgment as such (*k*). (4.) It is not, however, a ground of reduction on the merits that an arbiter has stipulated for remuneration prior to the submission, or even after his acceptance, if no material procedure has followed; or decerned for a sum, to be paid either directly or indirectly to himself, as remuneration for trouble, where nothing improper is intended,—the decree being only to this extent invalid; (above, § 171. 5.) But it is almost superfluous to state, that arbiters and their clerks ought carefully to exclude from decrees-arbitral all matter that could infer the slightest shade of suspicion of impure motives; for a very slender circumstance may have weight in a question of corruption. (5.) A valid objection on the head of corruption necessarily disqualifies an arbiter

from joining in the material step of appointing an oversman. (6.) A foreign decree-arbitral is protected by the Act of Sederunt (*l*).

2. *Other grounds.*—(1.) The exception of *ultra vires* has been already considered in relation to the powers of the arbiters; (above, § 171. 5, 6.) (2.) That arising out of a neglect or refusal duly to hear the parties, or to afford a full and fair investigation of the facts, is also noticed above, (§ 170. 4.) This objection has sometimes, but erroneously, been thought to be excluded by the Act of Regulations. It enters into the very essence of the whole proceedings, and is, moreover, sanctioned by the second clause of the submission, which gives authority to hear parties and take probation; whence the inference is inevitable, that the discussion and investigation must be full and fair, and it is not necessary therefore to aver corruption (*m*). (3.) Fraud or unfair procedure on the side of a party or his agent is a ground of reduction at common law, on the principle that he cannot take advantage by his own wrong (*n*). (4.) Deviation without mutual consent from a mode of proof specified and laid down in the submission is a valid exception (*o*). (5.) *Res noviter* is not received as effectual to set aside a decree-arbitral when due time has been allowed for adducing all necessary and competent evidence (*p*). It must in such questions, as a matter of course, appear that the cause of the delay has not been with the party benefited by the decree. (6.) It may, indeed, be laid down as a rule deduced from these and similar cases, that mere error in judgment, whether consisting in mistaken impressions of evidence or incorrect construction of pleadings, issues or writings, if arising solely in the mind of the arbiter, and not from imperfections in the procedure caused by his own refusal of a full and fair investigation and discussion, is, in the general case, no ground for the reduction of a decree-arbi-

tral. But this, like every other rule, is subject to exceptions. An arbiter cannot disregard an express statute; nor would it be safe to overrule a well-ascertained principle of law. Such cases, however, which are entirely circumstantial, can be but of rare occurrence; and they will be determined by the Court upon the broad ground that arbiters, although protected within very wide limits from the control of the ordinary judges, must be restrained from doing things so absurd as to exceed those bounds which persons entering into submissions must naturally suppose will confine their jurisdiction (*q*).

(*a*) Balfour, *Arbitrie*, c. 15, 21.

(*b*) 29th April 1695, § 25. "That for the cutting off groundless and "expensive pleas and processes in time coming, the Lords of Council and "Session sustain no reduction of any decree-arbitral that shall be pro-"nounced hereafter upon a subscribed submission, at the instance of the "parties submitters, upon any cause or reason whatsoever, unless that of "corruption, bribery or falsehood, to be alleged against the judges-arbitra-"tors who pronounce the same."

(*c*) Hardie, 18th Dec. 1724, M. 664; Williamson, 12th Dec. 1739, M. 665; Hetherington, 21st June 1771, M. App. *Arbitration*, No. 3.

(*d*) See Sharp, 20th Feb. 1815, Dow, 3. 102, where Lord Ch. Eldon directed the reversal of the judgment of the Court below, on the ground that a mere regulation of court could not control the eternal principles of justice involved in the due hearing of parties and full investigation of the facts.

(*e*) Mitchell, 14th Jan. 1715, M. 663.

(*f*) Dalgleish, 29th Jan. 1742, Elch. *Arbitration*, 7.

(*g*) Elliott, 15th Dec. 1789, M. 668; Mackenzie, 19th Dec. 1828, F. C., S. 7. 215; Tennant, 16th June 1836, D. 14. 976. See Home, 7th Feb. 1632, B. S. 1. 333; M'Kessock, 14th Nov. 1822, S. 2. 13.

(*h*) Blair, 12th Jan. 1738, M. 664.

(*i*) See Bryson, 10th June 1823, S. 2. 332. Here an averment was considered relevant, that one of the arbiters being creditor to the other had exercised undue influence over him.

(*k*) See Maule, 10th March 1816, Dow, 4. 365. The decree-arbitral was set aside as appearing to have been obtained for the purpose of validating or confirming a prior agreement or compromise entered into for or in name of the parties.

(*l*) Ochterlony, 8th Aug. 1754, M. 4470; Johnson, 13th Dec. 1776, M. App. *Arbitration*, No. 4.

(m) M'Phersons, 23d June 1831, S. 9. 797.

(n) Logan, 15th Nov. 1798, M. App. *Arbitration*, No. 6. Here the party had, by means of false statements, obtained the evidence which he adduced of the value of ground required by a canal company. Hercules Insurance Co. 26th July 1836, F. C., tried at Jury Sittings before Lord Moncreiff; Calder, 1st Feb. 1837; D. 15. 463.

(o) Heggie and Co. 1st Feb. 1825, S. 3. 488.

(p) Sharp, 17th May 1813, Dow. 1. 233. See Livingston, 11th June 1808, mentioned in note to report of Kirkaldy, 16th June 1809, F. C.

(q) See Young, 2d July 1678, B. S. 2. 230; Kirkaldy, 16th June 1809, F. C.; Berry, 15th Dec. 1827, S. 6. 256; Baillie, &c. 27th Aug. 1835, S. and M'L. 2. 243; Anderson and Miller, 6th Feb. 1836, D. 14. 447.

177. FORMS OF CHALLENGE.—The validity of decrees-arbitral is tried by suspension, exception or reduction, according to the circumstances of the case and the nature of the evidence. (1.) If the objection be fraud, forgery, corruption, or any objection which is extrinsic—not appearing from the terms of the decree itself, which is in all respects formal, and it behove the objector to adduce extraneous evidence in support of his averments, reduction seems to be necessary. (2.) Where, on the other hand, these averments are established by the decree itself, suspension, if the decree be capable of registration for execution, or exception, if an ordinary action be brought for implement, is a valid form of challenge; reduction being, however, in all cases competent (a). (3.) Suspension may, however, be resorted to in aid of reduction where the circumstances, although not justifying that form of review, are still sufficient to warrant the Court in calling on the party using diligence to find security for repayment in the event of the decree being ultimately set aside (b); or to stay diligence for the penalty where there are probable grounds for challenging the decree in a reduction (c), or it is exceptionable in point of form. In the latter case it is not clear that the decree may be turned into a libel (d). (4.) When the challenge is in the form of reduction on grounds arising

out of corruption on the part of the arbiter, it is proper that he should be made a party to the proceedings, although it is essential to call only the party. (5.) The procedure in the submission cannot be stopt by suspension (*e*); nor is it affected by the dependence of a process of declarator or of reduction (*f*).

(*a*) See this distinction laid down by Lord Medwyn in Whitehead, 16th Nov. 1833, F. C., which contains a full reference to the authorities.

(*b*) Taylor, 19th Jan. 1822, S. 1. 253; Hood, 13th Dec. 1832, S. 11. 207.

(*c*) Anderson and Miller, 6th Feb. 1836, F. C., D. 14. 447.

(*d*) See Williamson, 18th June 1777, B. S. 5. 428. The Court refused to turn the decreet-arbitral into a libel; but the objections appear to have gone beyond the mere form of the decree, and applied to the terms in which the decerniture was expressed. In M'Kessock, 14th Nov. 1822, S. 2. 13, the decreet appears to have been turned into a libel without objection, to the effect of allowing a reference to oath.

(*e*) Fraser, 5th July 1834, S. 12. 887.

(*f*) Abbot and Son, 12th May 1824, S. 3. 4; Fraser, as in (*e*).

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